

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

Honorable Brooks P. Goldsmith, Circuit Court Judge
S.C. SUPREME COURT

JAMES TINSLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001435

APPENDIX

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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1 stay here and enjoy the day with us.

2 MR. WELBORN: It will be a day, judge.

3 MR. SCHMECKPEPER: And, Your Honor, again I --
4 would argue -- would Your Honor like me to respond to
5 each of these allegations as he goes through them or
6 wait until the end?

7 THE COURT: Since he's already gone, let's go
8 ahead and let him --

9 MR. SCHMECKPEPER: Yes, Your Honor.

10 THE COURT: Just keep your notes.

11 MR. TINSLEY: All right. Your Honor, that was the
12 end of the ineffective assistance of counsel. The next
13 issue was -- or straight up constitutional issues that
14 could be raised at a PCR. And that was that I was
15 denied a sixth amendment right to counsel because I did
16 not knowingly, voluntarily, intelligently waive my
17 right to counsel.

18 I waived my right to counsel on the basis that
19 -- if you look at the document that I filed with the
20 clerk of court, the motion to -- I asked to represent
21 myself up in the caption, it says "Motion to Represent
22 Myself with the Assistance of Stand-by Counsel", so
23 there was a condition to my wanting to represent myself
24 that was not met. And I proceeded on the basis that
25 the South Carolina Supreme Court, in their case law,

1 said that I have a right to the assistance of counsel
2 even if I represent myself. They didn't say it's a
3 privilege. They didn't say that it was within the
4 judge's discretion. They said that I had a right to
5 that.

6 So I had a detrimental reliance on that and I --
7 I proceeded believing that I was going to be provided
8 with stand-by counsel or some alternative method of
9 access in the legal resources to prepare for court.
10 And when that didn't occur, then that invalidated, you
11 know, the waiver because I wasn't expecting that.

12 The next issue is that I was denied due process
13 of law where I was given a harsher sentence where the
14 judge acted with prejudice and vindictively and a
15 motive to give me a harsher sentence than my
16 co-defendant. And I believe he did that because the
17 evidence would show that they were trying to punish me
18 and get -- get at me because I was representing myself
19 and I filed that lawsuit and stuff.

20 And -- and if you look at everything that took
21 place, that they did to me in terms of the things that
22 they didn't rule on that they should have known better,
23 like merging the charges, the judge knew that he was
24 supposed to merge the charges. We talked about it on
25 the record. He read the statute in the record. He

1 nevertheless went ahead and went against what the law
2 says on purpose. And there's nothing in the record --
3 this all happened after I was -- had exercised my
4 rights. So I'm saying it was the presumption of
5 vindicativeness because it occurred after I exercised
6 my right.

7 And there's nothing in the record to support or
8 justify giving me a harsher sentence. I had no
9 criminal record at all. My co-defendant had a 20 page
10 long criminal record and they gave him probation, and
11 gave me a stack of multiple charges and run them
12 consecutive, and gave me more time than I could have
13 received for a single charge. And I believe that was
14 done vindictively.

15 The next one is I was denied due process of law
16 where the State did not obtain a true bill of
17 indictment under -- according to the law. The law --
18 law in South Carolina says that I have to be indicted
19 before a grand jury that convenes during a term of
20 General Sessions Court and is presided over by a
21 General Sessions judge. That didn't happen in this
22 case. I didn't discover that until later because I
23 relied on the information that was provided to me in
24 the indictment. And we discovered later that that
25 didn't occur and so that denied me a due process.

1 And I was denied due process when the State
2 failed to provide me with Brady materials. They had
3 made a deal with the co-defendant who -- he was facing
4 like 150 years. They made a deal with him that if he
5 would testify against me, they'd give him probation and
6 drop a bunch of other charges and allow him to plead
7 guilty to charges that actually occurred in another
8 county. And they never provided me with any of this.

9 I asked -- I asked him that on the stand, was he
10 given any deal, and he said no. And that wasn't true.
11 And the Solicitor knew it wasn't true. The judge knew
12 it wasn't true. They allowed it to go on anyway and
13 that created a false impression in the minds of the
14 jury. The jury assumed that this person was testifying
15 and implicating me, and that they had no benefit or
16 reason to get up and say things that weren't true
17 because of that.

18 And then when the judge gave me -- the
19 prosecutor gave his closing arguments, he also said
20 that, that there was no deal and no -- no -- the
21 probation and that he was going to have to face time in
22 other counties, and this, that and the other, and none
23 of that was true. And -- and that denied me due
24 process of law.

25 And the last one is that that evidence that has

1 never been heard required the reversal of the
2 conviction in the interest of justice because the State
3 relied upon false information and evidence. During the
4 trial, the co-defendant testified that I went with him
5 and stole these items. Well, the Solicitor, outside of
6 the jury's presence, he told the judge -- he said when
7 Justice says that I went with him and stole it, he's
8 lying. That's not true, that Tinsley never did go with
9 him and steal those things. He told that to the judge.

10 But then when the jury came in, in front of the
11 jury, he told the jury that that -- that Justice was
12 telling the truth when he said that I went with him and
13 helped him steal all these goods, and that they should
14 convict me because Justice was telling the truth. So
15 the Solicitor knew he was lying and didn't correct it,
16 and then went along with it.

17 And then during the trial, the detective for the
18 State testified that he went to the campground and was
19 taking photographs, and took photographs inside a
20 camper that we was staying in. And inside the camper,
21 he discovered these bill of sales. And he claimed that
22 the bill of sales had my name on them, and that that
23 showed that I had created those bill of sales, and it
24 shows that I have knowledge, one of the elements of the
25 crime, because I created the bill of sales to try to

1 prove that I had lost ownership of the property. I
2 alleged all along that those bills of sale did not have
3 my name or signature on them, and that they -- they had
4 been lying about it, but I didn't have any evidence to
5 prove that.

6 But after that, in my Federal suit, he testified
7 in his deposition that he -- that he didn't take those
8 photographs. He didn't go in the camper. He didn't do
9 no searches or seizures, or receive any evidence or
10 anything. So the exact opposite. Exactly -- had I had
11 access to that, it would have showed that I was telling
12 the truth. They had fabricated those bill of sales
13 themselves to try to convict me, and that -- that was
14 withheld from me.

15 And the Solicitor knew or should have known
16 that. He could have discovered that from talking to
17 the -- to the other detective and witnesses, he could
18 -- he knew -- I'm pretty sure he knew and understood
19 that those bill of sales was created by the police.
20 Because they didn't exist at the time of the discovery
21 was provided to me. And if -- if the State says they
22 didn't know it, then I couldn't have known it, because
23 I got whatever information I had from them. I was
24 locked up in a jail cell.

25 So that's basically all my issues. They are

1 all -- can be addressed with the transcript, the
2 records and recordings and everything -- of everything
3 that everybody says. It's part of the appendix here to
4 the summary judgment motion. And so I move for summary
5 judgment because I believe the court can address those
6 issues. It's just legal -- legal questions basically
7 that -- that can be resolved by looking at the
8 transcripts.

9 THE COURT: All right. Let me hear from the
10 State.

11 MR. SCHMECKPEPER: Thank you, Your Honor. I was
12 to -- the State opposes summary judgment for Mr.
13 Tinsley. Starting with the issue of ineffective
14 assistance of appellate counsel, I'd be happy to a
15 address any of those specific issues.

16 However, in the State's defense of that, the
17 applicant has the burden to prove the ineffective
18 assistance of appellate counsel. In this brief, I'll
19 go through real quick, the rule is that the Defendant
20 is entitled to effective assistance of appellate
21 counsel. However, although appellate counsel is
22 required to prove effective assistance, appellate
23 counsel is not required to raise every nonfrivolous
24 issue presented by the record. For judges to second
25 guess reasonably professional judgments, that impose on

1 counsel the duty to raise every colorable claim
2 suggested by a client would disserve the very goal of
3 vigorous and effective advocacy.

4 Attached to our appendix to this motion for
5 summary judgment is a letter from appellate counsel
6 explaining why they choose the issues they chose, and
7 that they weren't going to go through and address every
8 issue needed because they thought -- or appellate
9 counsel thought that his obligation -- his -- his
10 claim, claim in the briefs had the most merit. That's
11 reasonable, Your Honor.

12 Appellate counsel has the right to do that.
13 They don't have to -- again, they don't have to brief
14 every nonfrivolous issue. And I'll be happy to go
15 through each of these specific allegations one by one.
16 I don't think we get there based on the general rule
17 that appellate counsel has, you know, has the freedom
18 to make -- to decide which issues to break and which
19 issues are stronger.

20 It's set -- concerning the second issue, I had
21 the right to counsel because he did not know
22 intelligently --

23 COURT REPORTER: Mr. --

24 THE COURT: You've got to slow down.

25 MR. SCHMECKPEPER: I apologize, Your Honor. I'm

1 mumbling. Concerning the issue that applicant did
2 knowingly, voluntarily or intelligently waive his right
3 to counsel, not only I think does his history disprove
4 that claim, he's here pro se today. He's been pro se
5 in a number of other proceedings, even though we try --
6 I've also got evidence to present -- I've also got
7 evidence through testimony I'd like to present on that
8 issue. So that is an issue of material fact that's in
9 dispute as to whether or not he was properly explained
10 his right to proceed pro se.

11 Concerning whether or not he was denied the
12 supposed constitutional right to act -- to legal
13 materials free pretrial, and the right to stand-by
14 counsel, again responding to -- the State submits that
15 applicant was warned of the dangers to proceed pro se.

16 And in proceeding pro se, he said to those
17 dangers -- and went forth with -- with those in mind,
18 and assumed the risk of the fact that he didn't have an
19 attorney. And I think the record reflects he did a
20 pretty good job at trial. But, you know, there are
21 definitely some spots where he could have used an
22 attorney. And I think, you know, that's him -- that's
23 the risk he took when he chose to proceed pro se.

24 Concerning the allegation applicant was given a
25 harsher sentence than co-defendants, Your Honor, I

1 don't see any evidence in the record to support
2 granting relief on that ground, and the State would ask
3 for summary judgment on that issue.

4 Concerning the claim that the court lacks
5 subject matter jurisdiction because of the true bill
6 indictment did not return during the term of General
7 Sessions Court, Your Honor, I'd also ask for summary
8 judgment on that issue. The jurisdiction of General
9 Sessions Court is not affected by the validity of the
10 indictment. The General Sessions Court obviously has
11 the jurisdiction to hear criminal charges. The subject
12 matter jurisdiction to hear criminal charges, I would
13 be happy to forward some case law on that in writing at
14 a later time, Your Honor.

15 Concerning the fact that the State withheld
16 information concerning deals for leniency given the
17 co-defendant for his testimony against the defendant,
18 the State thinks that's disputed by the record. If I
19 recall correctly from reading the transcript, the
20 applicant tried to get the co-defendant to elicit
21 testimony that he was given a deal, from what I
22 understand he was offered -- I think -- I think the
23 State ended up recommending probation if he told the
24 truth during his plea. I'm not exactly sure of the
25 exact specifics, but I -- we can get to that testimony.

1 Concerning the allegation that counsel was
2 ineffective at trial -- the detective testified at
3 trial that he took pictures of the campsite, several
4 bills of sale -- Your Honor, that evidence -- the
5 evidence of the bills of sale -- the picture of the
6 bills of sale was admitted without the applicant's
7 objection by a previous witness. So I don't think
8 there is any really any issue of that coming in.

9 You are going to -- I think the deposition notes
10 -- which occurred three years after the actual trial,
11 another extra year after the actual -- I'm not exactly
12 sure of the exact timeline, it occurred several years
13 after the trial and after the investigation took place.
14 I think he's alleging that the officer who actually
15 took the pictures -- testified took the pictures at
16 trial, later said he didn't take any pictures at the
17 scene. The State would, again, note that -- that those
18 pictures came into evidence before the officer even
19 testified without objection by the applicant.

20 Your Honor, I think I have put everything -- but
21 if you have any specific questions, again, we ask
22 that -- the motion for summary judgment be denied, or
23 applicant's motion for summary judgment be denied, and
24 that the State's motion for summary judgment be granted
25 as to allegations four and five.

1 THE COURT: And four and five would be which ones?
2 I'm sorry.

3 MR. SCHMECKPEPER: Again, Your Honor, the
4 applicant was given the harsher sentence than the
5 co-defendant, and that violated his constitutional
6 rights. And then the court lacked subject matter
7 jurisdiction as a result of defects in the true bill
8 indictment.

9 THE COURT: And, Mr. Tinsley, I'll be glad to hear
10 any reply, if you wish to reply.

11 MR. TINSLEY: I would, Your Honor. Again, all
12 that he said, he really didn't point out any disputed
13 facts, so there is not any facts in dispute. Just as I
14 said, it's basically legal questions as to how he views
15 what the law is supposed to be.

16 And he is kind of correct about the ineffective
17 assistance of counsel claim, but the problem is that
18 all that has to be shown is that the attorney was
19 deficient and that you were prejudiced. It was
20 deficient not to have raised an issue that the prior
21 case law had already said is reversible error.

22 The Supreme Court has said that over and over
23 and over and over. It is reversible error if this
24 takes place. So an attorney who fails to do that, the
25 South Carolina Supreme Court also said in an

1 ineffective assistance of counsel case, that it's
2 automatic ineffective assistance of counsel because the
3 Defendant is inherently prejudiced by the fact of not
4 raising it. Because had it been raised, it would have
5 resulted in the reversal of the conviction.

6 The attorneys chose, for other reasons we
7 haven't talked about yet, not to raise -- to raise that
8 issue and raise another issue that was weird. It
9 wasn't successful. And I wrote them letters, and it's
10 part of the record.

11 And I told them before the Supreme Court even
12 ruled on it, I told them -- I called Moses off the
13 mountain, I told them what the court was going to say,
14 and how they were going to rule, and they ignored it.
15 And because the previous court case law has held all
16 these things that weren't -- is reversible error, it is
17 inherently and prejudicial not to have raised those
18 issues.

19 The other issue about the jurisdiction -- excuse
20 me -- that's a due process claim. And -- and he's
21 correct that it's not jurisdiction any more, that there
22 is no -- the jurisdiction is the power of the court to
23 hear cases, but that's not what I'm claiming. I'm
24 claiming that I was denied due process of law because I
25 had the right to object and require the court to get a

1 legal document, according to the law of the South
2 Carolina Supreme Court, the South Carolina case law and
3 statute, or South Carolina constitution, all give me
4 the right to have the legal -- a document obtained by a
5 legally constituted grand jury.

6 Because they lied on the indictment and said
7 that it was held during -- that it was obtained by a
8 lawful grand jury during the term of General Sessions
9 Court, and it wasn't, then that deprived me of the
10 right to complain about that. Because I had the right
11 to rely on that, and so that's a due process violation
12 not -- not a -- not a jurisdictional.

13 And as I said, all of this information is in the
14 record, all the legal arguments and case law and
15 everything is in my summary judgment motion to support
16 that. Thank you.

17 THE COURT: Do you want to respond to any of that?

18 MR. SCHMECKPEPER: No, Your Honor.

19 THE COURT: What's -- what's the name of the case
20 that says you have to challenge the indictment at the
21 beginning of trial?

22 MR. TINSLEY: Evans. Evans. It's not at the
23 beginning, it has to go before the jury renders its
24 verdict.

25 THE COURT: It's not Evans, is it? It's --

1 MR. TINSLEY: Gentry, but --

2 THE COURT: Gentry.

3 MR. TINSLEY: But Evans after -- Evans came after
4 Gentry and kind of -- kind of overruled Gentry a little
5 bit, changed it a little bit. Evans is the newer case
6 exactly on point.

7 THE COURT: All right. And Evans -- all right.
8 I've got the wrong computer. I don't have your motion
9 for summary judgment or the documents that you have
10 been talking about --

11 MR. TINSLEY: I have them, Your Honor, a copy for
12 you if somebody will hand it to you.

13 THE COURT: All right. I'm going to read Evans
14 unless you're ready to argue Evans. Have you read it?
15 I haven't read it. I haven't read it lately and can't
16 recall what it says.

17 MR. SCHMECKPEPER: No, Your Honor. And, again,
18 the allegation I believe in the motion for summary
19 judgment was related to jurisdiction. I think if I
20 understand correctly, part of his allegation is that it
21 wasn't -- the indictment wasn't issued during a term of
22 General Sessions. I think the Supreme Court order
23 issued by the Justice Toal saying the grand jury
24 doesn't have to convene during those calendar sessions,
25 that that they can also be scheduled by the chief admin

1 judge. I can pull that order. I can't get an internet
2 connection right now though, but I can certainly submit
3 that after this hearing.

4 MR. TINSLEY: If I can respond to that, Your
5 Honor. That's true, but that order came out in 2009.
6 My position would be that they didn't really have the
7 authority to do that any way, because they can only --
8 they only have the powers to write rules for the court
9 as long as it's consistent with the state laws and laws
10 of the State. And we have specific state law that says
11 that it can't be done that way.

12 THE COURT: I'm trying to find Evans. What's that
13 cite on Evans? You said you have got it there.

14 MR. TINSLEY: Ah, these handcuffs -- I can give
15 you the low down of it, Your Honor.

16 THE COURT: I've got it on my computer. I just
17 don't know which --

18 MR. TINSLEY: Six eleven -- I've got 611
19 southeastern 2nd 510.

20 THE COURT: Six eleven, five ten.

21 MR. TINSLEY: Basically, that they talked about
22 the previous case record that said that you had a due
23 process right to complain about an indictment. And if
24 you do that, and -- and they don't dismiss the charges,
25 that that is a due process violation. But then they go

1 on to say you have to object to it before the jury
2 renders its verdict. And I didn't do that in this
3 case, but I have an excuse for that. The excuse was
4 that I wasn't provided the information to note -- to
5 learn about it or discover it, the legal basis and
6 argument for it, or I would have objected to it.
7 Because I relied on the information that was in the --
8 provided to me in the indictment. On the face of the
9 indictment, it says that it was a true bill during the
10 term of General Sessions Court, so that's the reason I
11 couldn't object sooner.

12 (Pause.)

13 THE COURT: Okay. I've read Evans. Tell me one
14 more time in 25 words or less, Mr. Tinsley, your
15 argument, why Evans entitles you to relief.

16 MR. TINSLEY: Because I had a right to be indicted
17 by a lawful grand jury. I had the right to be placed
18 on notice of that problem with the indictment, so that
19 I could timely object to it and preserve it for appeal.
20 It wasn't preserved for appeal, but that doesn't mean
21 that I can't raise it in a PCR because there was an
22 excuse for the procedural default. Because I was
23 provided false information from the State on the
24 indictment that prevented me from discovering that
25 there was a problem with the indictment, and the Clerk

1 of Court didn't provide me any information prior to
2 being convicted about the indictment.

3 THE COURT: Did you -- did you ask for information
4 about the indictment?

5 MR. TINSLEY: Yes, I did. And they said that I
6 couldn't have it until I got convicted because it was a
7 secret, and that I'd have to wait until after I got
8 convicted --

9 THE COURT: Did you bring that to the attention of
10 the judge? That's what I'm looking for.

11 MR. TINSLEY: No, I -- I just asked the clerk, and
12 that's what the clerk told me. And I didn't know that
13 that wasn't right. I know today that that wasn't
14 right, but I didn't know that at the time because I was
15 in a jail cell and didn't have access to research and
16 such, no legal resources. That's why I say I wasn't
17 given the legal resources.

18 THE COURT: All right.

19 MR. TINSLEY: But I still have the right to rely
20 upon the regularity of the indictment, the -- had the
21 Solicitor not put information on there that was false,
22 that's the problem. It was -- it was -- I had the
23 right to rely on it and believe that the Solicitor
24 would put accurate and truthful information on there.
25 And I was kind of surprised when it wasn't. So that's

JAMES TINSLEY -- DIRECT EXAMINATION

1 what interfered. And that interference prevented me
2 from objecting in time to preserve it for appeal.

3 THE COURT: All right. The court agrees with the
4 State's position as to the judge's -- the sentence of
5 the judge and to -- and to the issues relating to the
6 indictment. Now, I guess we need to proceed with
7 testimony in the case. Mr. Tinsley.

8 MR. TINSLEY: Are you saying that you're not
9 granting summary judgment on the remaining issues, go
10 ahead and proceed with the trial?

11 THE COURT: Right. Right. I'm sorry.

12 MR. TINSLEY: Okay. That's okay. Yeah, I'll call
13 myself, James Tinsley.

14 THE COURT: Yeah. If you'll come around.

15 JAMES TINSLEY, having been
16 first duly sworn, testified as follows:

17 THE CLERK: Thank you. Please have a seat.

18 MR. TINSLEY: If it's all right, I guess I'll
19 testify in a narrative; is that okay, judge?

20 THE COURT: I'm sorry.

21 MR. TINSLEY: If I testify in a narrative be okay?

22 THE COURT: Well, as long as you keep it on point
23 with the issues in the case, yeah.

24 MR. TINSLEY: Okay. I'll try my best. And I
25 guess you also don't know a lot about the case, so I'll

JAMES TINSLEY -- DIRECT EXAMINATION

1 give a little background about -- about that.

2 THE COURT: Well, I've -- I've -- I've got the --
3 I have the transcript of the trial in front of me. Why
4 don't you address specifically each of your
5 allegations?

6 MR. TINSLEY: Okay. The first issue, the
7 ineffective assistance of counsel on appeal and claim
8 that the trial judge erred in failing to charge a jury
9 on a distinction between a larceny and receiving stolen
10 goods, and the jury found that the applicant stole the
11 goods himself, the jury must find him not guilty on the
12 indicted offense.

13 COURT REPORTER: Would you slow down just a little
14 bit?

15 MR. TINSLEY: I will. I'm sorry. And so like I
16 say, the -- the inference at trial created a disputed
17 fact as to whether or not I was the receiver or the
18 thief.

19 THE COURT: Okay.

20 A. And I asked the judge in writing to -- I think
21 that's appendix page 397, was a written request for
22 jury charges, to instruct the jury about that
23 distinction and tell them that if -- if they determined
24 that I was a thief, that they had to find me not
25 guilty. The judge refused to do that. He claimed that

JAMES TINSLEY -- DIRECT EXAMINATION

1 that was, you know, a question of law for the court.
2 Well, whether or not I'm a receiver or a thief is a
3 question of fact for the jury to determine. And since
4 it was supported by the evidence in the record, I
5 believe it is reversible error not to have given that
6 instruction because it misled the jury. The jury was
7 then allowed to assume that they -- it was lawful for
8 them to convict me even if they believed that I was a
9 thief. And that prejudiced my case, allowed me to be
10 convicted on an improper basis.

11 The next issue is that the applicant was denied
12 due process of law whether it was a material variance
13 between the State's evidence and the allegations in the
14 indictment, so the indictment alleged that I had
15 received the stolen goods. But when we got to court
16 and to the trial, the State's evidence, they argued
17 throughout the trial, witnesses testified that I was
18 actually involved in stealing the property. And that
19 was different -- was at variance to what was on the
20 indictment. And so the charge should have been
21 dismissed because it deprived me of -- of being
22 indicted. I was actually convicted of an offense of
23 larceny that I was not even indicted for.

24 MR. SCHMECKPEPER: Your Honor, I object. I'm not
25 sure he's actually pled this issue as an allegation, so

JAMES TINSLEY -- DIRECT EXAMINATION

1 I move it be stricken as relevant to allegations he's
2 proceeding on.

3 MR. TINSLEY: It's in my amended -- my amended
4 application.

5 THE COURT: Hang on just one second. Where in the
6 amended application?

7 MR. TINSLEY: I don't have it up here with me. It
8 was just filed a few weeks ago or something maybe -- a
9 few months ago on a form by itself, supplemental issues
10 or remitted issue.

11 THE COURT: Let's see. I have got one August 30,
12 the first amended application.

13 MR. TINSLEY: I don't think that's it. I think it
14 has been after that. I can't -- can I get down --

15 THE COURT: First --

16 MR. SCHMECKPEPER: Your Honor, just to clarify,
17 the issue of this -- this is kind of a complicated
18 procedural history because the applicant filed an
19 application in 2013. The State moved for dismissal
20 without prejudice because his appeal was still pending.

21 He subsequently filed this application -- the
22 2014 application, and there are a number of amendments
23 to that application. The State subsequently merged
24 the -- requested the 2014 application be merged with
25 the 2013 application, so it's kind of unclear what the

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1 actual allegations are in this case -- or which
2 allegations he's proceeding on.

3 THE COURT: Well, let's see. I -- I have two.

4 MR. TINSLEY: I'm proceeding -- I'm proceeding on
5 the latest ones, which would have been the second
6 730 -- whatever that case number is, that one. That's
7 the one that summary judgment was filed in and all
8 that, so that's where the majority of all the evidence
9 --

10 THE COURT: You are following that then, Mr.
11 Schmeckpeper -- because I'm not sure I have that. Let
12 me tell you what I have and see if that helps the two
13 of you. I have one dated August 30th of 2015. And
14 that is in 2014-737. The other one I have is 2014-737,
15 but it's dated June 3, 2015.

16 MR. SCHMECKPEPER: Your Honor, you have the first
17 amended application dated September 11 -- I think it's
18 distributed I think August 30th -- that's -- I think
19 that's the most recent amended application that I have.

20 THE COURT: The first amended application, I'm
21 sorry. I have got that.

22 MR. SCHMECKPEPER: If there is a second amended
23 application -- I'm saying the supplemental issue for
24 post conviction review --

25 THE COURT: I don't have that.

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1 MR. SCHMECKPEPER: Dated June 3, 2015.

2 THE COURT: I'm sorry. That's the one I said I
3 did have. June 3, --

4 MR. SCHMECKPEPER: Yes, Your Honor.

5 THE COURT: -- 2015, I have those two documents.

6 MR. SCHMECKPEPER: And then I've also got the
7 actual original applications on the 272 and the 2014
8 application, the Applicant probably has a different
9 document -- I don't -- I don't believe I have that.

10 COURT REPORTER: I'm sorry. What was it you
11 didn't have?

12 MR. SCHMECKPEPER: I mean, if the Applicant is
13 referring to an amendment filed after the August 30,
14 2015 investigation, I don't believe I have that.

15 THE COURT: I'm sorry. The only other one I have,
16 if this helps, is I guess what would be the first one,
17 which is in November of 2014.

18 MR. SCHMECKPEPER: And, Your Honor, I believe I
19 may have just located it -- December of 2015. May I
20 approach? I believe this is actually the allegation.
21 I don't have a filed copy of this. This is everything
22 that I can find in my file.

23 THE COURT: All right. That's the one you are
24 referring to now?

25 MR. TINSLEY: Bailey -- based on the Bailey case,

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1 Bailey vs. State.

2 THE COURT: Bailey vs. State. All right. Now, a
3 moment ago, you were objecting on the grounds of --

4 MR. SCHMECKPEPER: I'll withdraw that objection,
5 Your Honor. But I believe that specific issue is also
6 covered by the motion for summary judgment. So at this
7 point, he has changed it to an allegation of
8 ineffective assistance of counsel -- but to be able to
9 raise it, I think it's the same issue. And also it
10 wasn't preserved for appeal.

11 THE COURT: Yeah. Go ahead.

12 MR. TINSLEY: Yeah. It was -- it was preserved by
13 directed verdict of a motion -- I claimed it with the
14 variance with the evidence. And anyways, the judge
15 he -- he denied -- refused that, and that issued should
16 have been raised because it -- it -- it required me to
17 be prepared for one thing when I showed up for trial,
18 they proceeded on a separate basis and different
19 argument all together.

20 And the next issue is that the judge erred in
21 failing to charge the jury with mere presence and
22 abandonment. As I said, Mr. Justice testified that I
23 went with him and helped steal these goods, but I
24 testified that I didn't; that he had brought them there
25 and asked me to help him, so -- him on my Ebay website,

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1 because I had a successful Ebay web business, and that
2 I knew nothing about them being stolen. And that
3 later, a few days before my arrest, I did come to find
4 that there was something suspicious about them because
5 he changed his story about where they came from.

6 And so I, at that point, abandoned any further
7 involvement with him. And so I asked the judge to
8 charge -- to charge the jury with mere presence and
9 abandonment because the charge was supported by the
10 evidence in the record. And he refused to do that.
11 And I claimed that that was reversible error and should
12 have been raised on direct appeal, particularly in this
13 case, mere presence is important for the jury.

14 The judge in this trial had a difficult time --
15 he didn't understand the difference between actual
16 possession and constructive possession. And I kept
17 trying to bring that point up, but he couldn't seem to
18 grasp it.

19 But what the State -- even though the State
20 didn't understand it either, what they were claiming
21 was that I had dominion and control over the warehouse
22 where these stolen items were found at the campground.
23 So they were claiming that I had possession based upon,
24 you know -- constructive possession based -- based upon
25 I had a location where the items were found and

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1 discovered. And so I -- my testimony was that I was
2 just merely present around them, so they should have
3 been instructed that, you know, mere presence in the
4 area where the goods are found and located does not
5 constitute knowledge of the goods, but it also doesn't
6 constitute possession, two of the elements of the crime
7 was taken away from them to understand, because he
8 refused to do that instruction.

9 I had asked the judge -- the next issue, I had
10 asked the judge for a continuance and for funds to hire
11 a handwriting analysis to dispute the State's surprise
12 evidence. He refused to give that. I had -- I had
13 filed a lawsuit against him because they had -- would
14 -- had taken my property and wouldn't give me my -- my
15 money back and my property back, so that I could use it
16 for bond.

17 And they -- I had just filed a summary judgment
18 motion in the federal case. And the next thing I know,
19 they come up with these surprise bill of sales that
20 they claim had my name and signature and handwriting on
21 them. So it was a complete surprise to me. They
22 weren't provided to me six months prior to this at the
23 first opportunity for discovery.

24 And so since it was a surprise when I got them
25 that very night, I was in the jail cell. I sat down

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1 and wrote the court and asked for a continuance and
2 asked for funds to hire an expert so I could dispute
3 that. I thought that would be important because my
4 whole claim was that Mr. Justice was implicating me to
5 get himself out of trouble, and that the State had
6 created these bill of sales to try to get out of my
7 Federal lawsuit. Because they thought if they could
8 get me convicted, that that would help them get the
9 Federal lawsuit dismissed under Heck vs. Humphreys.

10 And so that was my whole argument to the jury,
11 but I didn't have any evidence to support any of this
12 because they had withheld the Brady materials and
13 because they, you know -- I didn't have the -- they
14 sprung this surprise bill of sales on me and I wasn't
15 given the opportunity to dispute them with an expert.
16 And I believe the judge erred by not giving me the
17 funds for an expert and giving a continuance based on
18 that surprise information like that.

19 And -- and it violated the rules of evidence --
20 the rules of civil -- of criminal procedure of 583,
21 which required them to provide them with discovery
22 within 30 days. And that, in itself, doesn't
23 necessarily require reversal of a conviction unless the
24 defendant can show that he was prejudiced. And in this
25 case, it did prejudice me because that's the argument

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1 that they made to the jury, was that those bill of
2 sales showed that I had knowledge that the crime --
3 that they were stolen because I had created them myself
4 to try to claim lawful ownership. And so had I had
5 access to an expert testifying on that, then that would
6 have, you know, supported -- bolstered my arguments.

7 And let's see, the next issue was that the --
8 the judge had failed to merge all the indictments into
9 a single offense which violated the State's statute
10 and amounted to double jeopardy. So, again, I had
11 asked the judge to merge all the charges into a single
12 offense because they claimed that I possessed them all
13 at the same time.

14 I had constructive possession, according to
15 them, at the same time of both the goods at the
16 campsite and those at the storage facility. And that
17 those should be -- all constitute one single offense.
18 And the judge did do that on a couple of offenses, but
19 he didn't do the rest.

20 And they were, you know, according to the
21 evidence in the trial, everything was possessed at the
22 same time. And so it should have -- it should have --
23 they should have all been merged into a single offense.
24 And he didn't do that, and that violated the State
25 statute.

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1 And, also, he gave me multiple consecutive
2 sentences with a total amount of 14 years. And the
3 maximum amount of time you can give for receiving
4 stolen goods is 10 years. So I was given more time
5 than I could have received for a conviction on a
6 maximum term for a single offense. And I believe that
7 violates double jeopardy and should have been raised on
8 direct appeal.

9 Let's see, the next issue is that the judge
10 erred in failing to conduct an incamera suppression
11 hearing, and that prevented me from introducing
12 evidence to support my claims. So prior to trial, I
13 had -- I filed a motion to suppress evidence. And just
14 like in my motion for a continuance, and the motion for
15 the funds, and the motion for appointment of stand-by
16 counsel, with his motion, too, it's all in the
17 State's -- the Solicitor's office is the one that's
18 responsible for scheduling motion hearings, and they
19 just ignored my motions all the way up until the day of
20 the trial.

21 I find myself standing in front of the judge
22 with all these motions, and he's looking at me like,
23 you know, you're trying to delay the trial when it is
24 not my fault. I -- I filed a motion just as soon as I
25 could, so he -- he was kind of angry at me, like it was

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1 my fault, and refused to give me the incamera
2 suppression hearing. He wanted me to -- to argue those
3 points during the trial.

4 Well, the problem with that is that it allowed
5 the State to -- witnesses to get on the stand and
6 testify and say what they wanted to say, but it didn't
7 give me the opportunity to put up any of my witnesses
8 or any of my evidence. So the State's witnesses
9 testified that they went there at the scene and they
10 saw the property in plain view. And that they left and
11 they went and got a warrant, and returned with the
12 warrant and took the property.

13 But what they didn't say was that they had to
14 cross a fence and private posted -- privately posted
15 property in order to be standing in a place where they
16 saw that information and items. And then when they
17 went to get a warrant, they didn't tell the magistrate
18 that they had already violated the fourth amendment
19 in -- in getting to the location where they saw the
20 property.

21 And I believe that if the judge allowed me to
22 introduce that evidence, the outcome would have been
23 different. In fact, in the motion for -- motion for
24 the suppression hearing, I'm -- I mentioned that in the
25 actual motion itself. It's a part of the appendix to

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1 the summary motion judgment. I mentioned in there that
2 the police had, you know, trespassed on private
3 property to get to the location in order to view the
4 items, and that they didn't tell the judge. So the
5 judge knew what I was going to say if I got on the
6 stand, and what my evidence would say, so he found a
7 way to try to keep me from introducing that evidence.
8 And it allowed the State to put up whatever evidence
9 they wanted to say, but prevented me from a full, fair,
10 and adequate opportunity to present my claims. I
11 believe that should have been raised on direct appeal.

12 The next issue is that the judge erred in
13 failing to provide applicant with stand-by counsel or
14 some other method of conducting pretrial research in
15 violation of the State Constitution and the 14th
16 amendment of due process and equal protection of the
17 law rights. So I was in trial. I had every
18 intention -- or I was in jail. I had every intention
19 of using an attorney, was wanting to hire my own
20 attorney, a paid attorney, but they had seized all my
21 money and gold and cash and property, and they wouldn't
22 release it, so I was forced to take a State appointed
23 attorney.

24 And he came to visit me and he didn't even know
25 my name. And I tried to explain to him this -- the

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1 fact -- I was trying to get him to help me get bond so
2 I could do a little research and talk to witnesses and
3 stuff, because I didn't know what was going on.

4 And I explained to him that I had already paid
5 bond on two charges and that I can't be convicted but
6 for one charge under the law. And so, therefore, I
7 should be able to sign my own -- or something on these
8 other charges, and that would allow me to be released
9 where I could do some research and stuff into this
10 case. And he didn't understand the legal argument at
11 all. So I was thinking to myself, there is no way I
12 can let this guy try to represent me if he don't
13 understand basic stuff about the law like this.

14 And so I said, well, what I'll do is I'll ask a
15 court -- I knew that there was prior case law that says
16 I had the right to represent myself with the assistance
17 of stand-by counsel. And I knew the Federal case law
18 said that I had -- the court was required to provide me
19 with resources to prepare my defense. So I said, I'll
20 ask the court to represent myself with the assistance
21 of stand-by counsel. I never asked to waive counsel, I
22 just asked to represent myself with stand-by counsel.

23 So he schedules it for a hearing or gets to go
24 before a hearing -- before Judge Maddox, and Derek
25 Enderlin was the public defender. And he asked to be

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1 relieved of counsel and he wanted -- he wanted the
2 public defender's office relieved as counsel. So I had
3 a problem with that. I thought it was all actually
4 good for me. I was thinking the judge would appoint me
5 an actually paid attorney, you know. I thought it
6 would work out good for me.

7 And so he didn't say that he wouldn't, and Judge
8 Maddox didn't give me any warnings of the dangers of
9 representing myself, but that's -- that's not
10 necessarily that big of a deal in this case.

11 What's important is that he didn't tell me that
12 he could -- would force me to stand trial without the
13 assistance of stand-by counsel. And he didn't tell me
14 that because that would be the exact opposite of what
15 the law says. So I had a reliance that I was going to,
16 you know, be provided with some form of research
17 resource. And I had to -- decided that I would offer
18 the stand-by counsel as the alternative because that's
19 how most courts handle the situation.

20 And so a few days after that, I get an order in
21 the mail from Judge Maddox saying that he's going to
22 let me represent myself, but -- and he's relieving them
23 as counsel, but he didn't say anything about appointing
24 me any other attorney. He said he's not going to do
25 that, that that would be hybrid representation.

1 So I recognized immediately that that's not
2 hybrid representation. So I sat down and filed another
3 motion to appoint stand-by counsel to assist me. And,
4 of course, that motion didn't get heard or scheduled
5 for a hearing until the day of trial.

6 And so I get in the courtroom. But, again, I'm
7 having to bring it to the judge's attention that I need
8 a continuance to be appointed stand-by counsel so I can
9 do legal research and talk to witnesses. None of this
10 had been done at this point because I hadn't been given
11 an attorney or stand-by attorney to help me do those
12 things, and that denied me a due process of law. And I
13 told him I wasn't -- I wasn't able to defend myself.
14 And that's the -- that's the -- all of the ineffective
15 assistance of counsel claims.

16 The next issue is that applicant was denied his
17 his sixth amendment right to counsel because he did not
18 knowingly, intelligently or voluntarily waive his right
19 to counsel. So I agreed to represent myself with the
20 assistance of stand-by counsel. I never actually
21 waived counsel. No one ever told me that they were
22 going to tell me that I was going to be forced to stand
23 trial without counsel. So I proceeded on the basis and
24 had a detrimental reliance on a belief that I was going
25 to be provided with an attorney. That's exactly what

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1 the case law says.

2 The South Carolina Supreme Court has repeatedly
3 said this, but the attorneys keep missing it. And they
4 keep thinking that it's -- that it's hybrid
5 representation. Well, hybrid representation is when a
6 defendant represents himself and a co-counsel is
7 appointed to represent the person that has co-counsel.
8 And in that situation, the defendant can claim
9 ineffective assistance of counsel against his
10 co-counsel. And the court won't allow you to do that
11 because, you know, you could kind of rig it or whatever
12 to make up ineffective assistance of counsel claim
13 against your own co-counsel, so they don't allow that.
14 But they do allow stand-by counsel.

15 And in the stand-by counsel cases, the defendant
16 waives the right to claim ineffective assistance of
17 counsel against himself and co-counsel or the -- it's
18 not even co-counsel, but stand-by counsel. And that
19 solves that problem. And so that's what I was trying
20 to do here.

21 And by the way, every case on the law books is
22 mentioned in my summary judgment motion and stuff,
23 every single one of them was given stand-by counsel.
24 I'm the first defendant that I know of in the State of
25 South Carolina that was ever forced to go to trial

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1 without a stand-by counsel. That issue alone is an
2 equal protection violation right there because they
3 were treated differently than me.

4 But in the cases that deal with this on the
5 books, such as -- well, Reed, for example, the
6 Defendant wasn't even stand-by counsel, but -- and he
7 conducted his entire trial. And then at the end of the
8 trial, he asked -- it was the sentencing portion of the
9 trial, he asked -- he wasn't prepared. He didn't think
10 he was going to get convicted, so he wasn't prepared to
11 handle the sentencing phase of the trial. So he asked
12 the court to appoint the attorney -- his stand-by
13 counsel as co-counsel, and let him represent him during
14 the sentencing phase of the trial, and the judge
15 wouldn't do that. He said I can't do that because
16 you're asking me to convert his status from stand-by
17 counsel into co-counsel from a situation where you
18 can't claim ineffective assistance of counsel against
19 him into a situation where he can be. And if I do
20 that, that's hybrid representation.

21 And the Supreme Court upheld the judge's
22 decision, and said there's nothing wrong with what the
23 judge did. That's exactly the way it is supposed to be
24 done. And he said the -- the defendant has the right
25 to the assistance of stand-by counsel, and then he can

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1 use that assistance to whatever extent he desires.
2 What they were saying was -- they could -- he could
3 have had that attorney do his sentencing portion of the
4 trial for him, he just would have had to do it as
5 stand-by counsel. He couldn't do it as an appointed
6 represented co-counsel where he could get -- claim
7 ineffective assistance of counsel.

8 So all I was doing in this case was trying to
9 get some alternative resource to prepare for my trial.
10 I wanted to represent myself, but I needed the
11 resources to do that. Otherwise, your forever rights
12 are just meaningless. If you -- if you don't have the
13 ability to actually prepare a defense and talk to
14 witnesses and study the law, I mean, it's just
15 meaningless. And so I was trying to get some method of
16 doing that.

17 And it was fine with me if the court wanted to
18 let me have access to the law library, that would have
19 been fine. I wouldn't have complained about that a
20 bit, but I was willing to do stand-by counsel. That's
21 what the case law says that I have a right to have and
22 so that's what I asked for. And I was surprised when
23 I -- when I wasn't given that. Because my whole basis
24 and reasoning for doing that was I was under the
25 assumption that I was going to be provided with that.

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1 And when I wasn't, it surprised me that the court would
2 force me to stand trial without any kind of research or
3 assistance or anything. And I'm claiming that that
4 made my waiver of right to counsel invalid.

5 Now, had I asked for something -- because like I
6 say, the judge didn't mention any warnings on the
7 record, the dangers. But I think -- I think we made it
8 kind of clear that I know a little bit about the law,
9 and so you can go based on my prior knowledge also as
10 to whether or not I would understand what I was
11 waiving. And so that actually works against the State
12 in this situation.

13 Had I been asking for something that the law
14 says is not lawful for me to have, if I had been asking
15 like these other defendants to have an attorney
16 appointed as co-counsel, this hybrid representation,
17 you know -- I was saying because I wasn't given that,
18 that invalidates my -- my waiver of right to counsel.
19 Then the court can say, well, I don't find that
20 credible. You know, you know enough about the law to
21 know you can't ask for that, so that couldn't be the
22 basis for your wanting to represent yourself. So
23 that's not what I'm claiming in the case.

24 I'm claiming something that was law. I'm
25 claiming something that I had a reasonable belief that

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1 I was entitled to under the case law. What I asked the
2 court to do for me was completely legal. It was based
3 on sound principal of law. What the court did to me
4 was a violation of that law, a violation of my rights,
5 and treated me inappropriately, I believe, in this
6 case. And it was a surprise to me and that that's why
7 it doesn't constitute a knowingly and voluntarily and
8 intelligent waiver of right to counsel.

9 The next issue -- you said you ruled against the
10 harsher sentences; is that right?

11 THE COURT: Right.

12 MR. TINSLEY: The next issue is then -- you ruled
13 against the true bill of indictment too?

14 THE COURT: Yes.

15 MR. TINSLEY: All right. The next issue is the
16 applicant was denied due process of law when the State
17 failed to provide the Brady materials concerning deals
18 for leniency, and things of value, or other benefits
19 given to Hugh Justice in exchange for his testimony
20 against the applicant, and by the Solicitor's failure
21 to correct the false testimony or false impression when
22 it occurred.

23 So Mr. Justice had entered some kind of plea
24 deal with the State to testify against me in exchange
25 for probation. He was allowed to -- I found out later,

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1 he was allowed to have five indictments dismissed. He
2 was allowed to -- which means he didn't -- he got a
3 benefit from that, he didn't even have to go to trial
4 on those five charges.

5 Then he was allowed to plead guilty to five
6 larcenies that occurred in another county, in Ocone
7 County, and that benefited him because he was then
8 prevented -- the other counties from prosecuting him
9 for larceny under double jeopardy. None of the -- he
10 was offered probation. None of this was provided to me
11 in discovery.

12 And so when I asked him about this on the stand,
13 he denied that there was a deal. He acted like it was
14 just, you know, conversations; that it wasn't no big
15 deal; that it couldn't be enforced.

16 And so after the trial, when we get a hold of
17 this transcript and find out there -- there was a deal
18 and -- and he was -- he pled guilty, entered his plea
19 before he testified in my trial. The judge accepted
20 his plea agreement. The terms of the plea agreement
21 and promised to give him the probation, just like he
22 had said, in exchange for his testimony if he would
23 testify against me.

24 So at trial, what -- I wanted that information
25 to show the jury that he was motivated mainly to give

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1 false information, false testimony against me to help
2 himself out. And that his -- his credibility and
3 truthfulness should have been called into question
4 about that. But I was prevented from doing that
5 because I wasn't provided with that discovery.

6 And during -- during closing arguments, the
7 State kind of bolstered that. They didn't object when
8 he lied. The Solicitor knew that he was lying when he
9 said there was no deal. He was there. It was the same
10 Solicitor. And instead of objecting to it, he allowed
11 it to go uncorrected. And in closing arguments, he did
12 the same thing and bolstered it. He got in front of
13 the jury and told the jury that there is no deal. That
14 it is just a recommendation. And, oh, the judge can
15 sentence him to anything he wants. Well, he couldn't.
16 That wasn't true.

17 And then he went on to say that, oh, that he can
18 -- still has to face all these charges in all these
19 other counties, that wasn't true. His -- they were
20 basically implying to the jury that he had no reason to
21 put himself in harms way like that because it could
22 only turn out bad for him. It was only going to hurt
23 him because now he had to probably get a harsher
24 sentence by the judge and he's going to have to face
25 trial in all these other counties, and none of that was

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1 true.

2 Had they been told the truth, the truth was
3 because of his testimony, he was -- had five charges
4 dismissed. He was allowed to plead guilty to charges
5 in South Carolina that occurred in other counties, in
6 Oconee County, and that prevented him from facing a --
7 he was facing 150 years in all of those other counties.
8 He was able to drop that down to probation because of
9 his testimony. That's a motivation to testify and give
10 false testimony to help yourself, and the jury should
11 have been aware of that. And that -- that he had given
12 that previous false testimony concerning that.

13 And when they hid that and kept -- kept that
14 covered up and then misled the jury about that, they
15 misled the jury concerning, you know, the impression
16 that they might have received by his testimony had they
17 known the truth. And -- and I believe that denied me
18 due process of law in two ways, in the Brady violation
19 and in the prosecutor's failure to correct it.

20 And the final issue is that evidence that has
21 never been heard -- or required for the reversal of the
22 conviction in the interest of justice. As I said, the
23 Solicitor mentioned to the judge several times during
24 the trial that Mr. Justice was testifying falsely when
25 he claims that I helped him steal those goods, that

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1 that didn't happen. Yet he turned around and told the
2 jury that I -- that Justice was telling the truth, and
3 that I did help him. So he knew for a fact that he was
4 testifying falsely about that, and he allowed it to go
5 uncorrected.

6 And then turn around and tried to bolster his
7 testimony himself by saying that he was telling the
8 truth when he knew that it wasn't. And he allowed him
9 to testify that way because that was the only evidence
10 really -- that and the bill of sales that suggested
11 that I had any knowledge that it was stolen. And that
12 was an element that they had to prove, so he allowed
13 that, too, in order to try to bypass that.

14 THE COURT: Tell me -- tell me that again because
15 I'm not sure that I caught that. Is that the same
16 argument that you related earlier about the bill of
17 sale?

18 MR. TINSLEY: No. The other argument was that I
19 wasn't given a continuance so I could get an expert --

20 THE COURT: No, I'm sorry. When you were making
21 your motion for summary judgment, are you now going
22 back to the same argument? I'm just trying to make my
23 notes jive with what you're telling me now.

24 MR. TINSLEY: Did I mention this when I was doing
25 the summary judgment? Is that the question?

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1 THE COURT: Let me restate my question. All
2 right. The deputy's testimony you're complaining about
3 now.

4 MR. TINSLEY: Right.

5 THE COURT: Is that related to the bills of sale
6 that were presented?

7 MR. TINSLEY: What I was about -- what I was about
8 to testify is about -- the detective testifying about
9 the photographs and stuff.

10 THE COURT: Okay. Well, go ahead then. I'm
11 sorry.

12 MR. TINSLEY: So, anyways, the Solicitor knew that
13 Mr. Justice had provided the false testimony because he
14 said so on the record, but he didn't correct it in
15 front of the jury. And that -- then the -- the
16 attorney -- I mean, the detective for the State
17 testified that he found these bill of sales while he
18 was doing -- taking photographs and searching the
19 property and the camper, and that he found these bill
20 of sales inside --

21 THE COURT: Okay.

22 MR. TINSLEY: -- this camper cabin, or something
23 he said, and that those bill of sales, if nothing
24 else -- if the jury don't believe anything else, they
25 should believe those bill of sales because they have my

JAMES TINSLEY -- DIRECT EXAMINATION

1 name on them and that I must have created them to show
2 that I had knowledge that -- an attempt to claim lawful
3 ownership of the property, and that that shows that I
4 have knowledge that the goods were stolen.

5 But after the trial, he testified in his
6 deposition that he didn't find any evidence in that
7 camper. So his whole story about the bill of sales is
8 a lie, and I believe that they knew that. Because
9 those bill of sales weren't provided to me at the time
10 of mutual discovery. They knew they didn't exist then,
11 and so the Solicitor, at the very least, should have
12 been asking these other detectives where did these bill
13 of sales come from. They didn't exist six months ago.
14 And I was hooting and hollering and saying they made it
15 up, they made it up, but I didn't have any evidence to
16 prove it.

17 Now, after the conviction, when he does his
18 deposition, now I have the evidence to prove that he
19 had made it up, but that wasn't provided to me. And I
20 believe the State -- I believe the State knew that he
21 was given false testimony about those bill of sales. I
22 believe they knew that there was a conspiracy going on
23 to try to cover up -- cover up the lawsuit, and get out
24 of the lawsuit, and that they created it.

25 And I believe that they could have discovered

1 that. If he didn't know, he could have at least
2 discovered it from talking to the other detectives
3 because -- that were there. Because no one else ever
4 said, hey, look, there is no report saying, hey, look,
5 we found these bill of sales and they've got his name
6 on it. If they had found a big piece of evidence like
7 that, there would have been some kind of investigator's
8 report where the detectives found them and all of that
9 kind of stuff. There was nothing and it was because
10 they made them up.

11 And even if the Solicitor didn't know about it,
12 I couldn't have known about it either. That's the
13 reason I say it's information that's never been
14 previously presented to the court. I didn't know about
15 it either and -- because I only got what information I
16 have from the -- from the Solicitor through discovery.
17 And if they couldn't have discovered it or known about
18 it, I couldn't have either. That -- that concludes my
19 issue.

20 THE COURT: All right. Do you want to cross
21 examine now or take a lunch break? How long are you
22 going to be?

23 MR. SCHMECKPEPER: Not too long, Your Honor. I
24 was just going to go through the issues. I don't think
25 it will take a long time.

JAMES TINSLEY -- CROSS EXAMINATION

1 THE COURT: All right. Go ahead.

2 CROSS EXAMINATION BY MR. SCHMECKPEPER:

3 Q. Good afternoon, Mr. Tinsley.

4 A. Good afternoon.

5 Q. I'm just going to run through these
6 allegations and ask you a couple of quick questions,
7 and I have all my notes in order.

8 MR. SCHMECKPEPER: I beg the court's indulgence.

9 BY MR. SCHMECKPEPER:

10 Q. Mr. Tinsley, let's talk about your claim of
11 ineffective assistance of appellate counsel for failing
12 to brief a number of issues. You're saying counsel --
13 did you get a letter from Tristan Shaffer at any point
14 telling -- in response to your request to brief a
15 number of issues?

16 A. He wasn't my initial -- I guess I should go
17 into that a little bit. He wasn't my initial appellate
18 attorney --

19 Q. He -- he did a final brief; is that correct?

20 A. Well, I don't -- I don't think he did it. He
21 might have just copied what was already there.

22 Q. His name was on it?

23 A. I don't recall. It very well may have been.
24 But these issues were supposed to have been briefed by
25 Celia Robinson. She had my case originally. And what

JAMES TINSLEY -- CROSS EXAMINATION

1 she wrote and told me was that she had brain surgery.
2 And she was in a hospital at the time my brief became
3 due. And she didn't have my case on her calendar. It
4 didn't pop up as being due. And on that day, she was
5 notified by the Clerk of court, called her up, and said
6 hey, you know for -- you know this guy's brief is due
7 today. And she said, no, I didn't know that. So she
8 rushed and just did one issue.

9 And then it got -- it got -- it got sent over --
10 or she left after that. I don't know why if it was for
11 her surgery or whatever, but the case got handed over
12 to Tristan Shaffer. So I wrote him and asked him to
13 brief these issues that was supposed to be briefed and
14 --

15 Q. So Mr. Shaffer was your eventual appellate
16 counsel?

17 A. Right. Eventually he -- he was at the time.

18 Q. And you asked that he brief all these issues?

19 A. I asked him -- yes. And I pointed out why
20 they needed to be briefed. And he commented that if he
21 wasn't going to do that -- apparently they have some
22 kind of -- I don't know, professional courtesy or
23 something, that some other attorney takes -- starts
24 with a case, they just kind of adopt whatever they did
25 and not do anything to make the other attorney look

JAMES TINSLEY -- CROSS EXAMINATION

1 bad, so.

2 MR. SCHMECKPEPER: Your Honor, may I approach?

3 THE COURT: Yes, sir.

4 BY MR. SCHMECKPEPER:

5 Q. I'm handing you a letter from Robert Dudek,
6 chief -- it is attached to a letter from Tristan
7 Shaffer, who was at the time a public defender; do you
8 recognize this letter?

9 A. Yes. I believe both of these are part of my
10 appendix to my summary judgment motion.

11 MR. SCHMECKPEPER: Your Honor, I would ask that
12 these letters be admitted into evidence.

13 THE COURT: Okay. All right.

14 A. Does that have to be done again, I mean, since
15 they're already in evidence? It's just a question for
16 me -- do I need to do that?

17 THE COURT: He can do it, because I'm not sure
18 I've got all those -- the motion for summary judgment
19 you were talking about.

20 (Respondent's Exhibit No. 1 admitted into
21 evidence.)

22 BY MR. SCHMECKPEPER:

23 Q. And as you said, these were in your appendix?

24 A. Yes, sir.

25 Q. Specifically appendix pages 570 through 572 in

JAMES TINSLEY -- CROSS EXAMINATION

1 your appendix?

2 A. Yes, sir.

3 Q. Your appendix. Where did -- in this letter,
4 what did Mr. Shaffer give as his reasoning for not
5 amending his appeal?

6 A. He didn't. He -- I don't think he gave -- I
7 mean, you might remember better than I do, I don't know
8 that -- he just said that he wasn't going to attempt
9 to -- to amend it. I asked him to do it because of the
10 law said that you can amend it prior to oral argument.
11 And so he just said that he wasn't. He said that if
12 Ms. Robinson has missed a winning issue, that I could
13 raise it on a PCR. That's basically the gist of it.

14 Q. Did he -- he -- correct me if I'm wrong, he
15 said that the essence of your motion contained --
16 concerns an issue that should be resolved on a PCR;
17 correct?

18 A. That -- that's what his opinion was, yeah,
19 some of the issues. I don't know what issue he was
20 talking about, but.

21 MR. SCHMECKPEPER: Beg the court's indulgence.

22 BY MR. SCHMECKPEPER:

23 Q. You mentioned that the thief defense made
24 it -- was strong enough to brief; is that correct?

25 A. Well, I -- you mean in this letter?

JAMES TINSLEY -- CROSS EXAMINATION

1 Q. Yeah.

2 A. I don't remember exactly but -- what he said
3 in the letter. But, you know, I -- I was in agreement
4 that that's a strong argument, the difference between
5 thief and the receiver. The problem is in order to be
6 granted a directed verdict acquittal, there can't be
7 any evidence in a record that the jury could find
8 guilty, since there was a bill of sales that indicated
9 that I could have been a receiver, that was a disputed
10 fact. That was something that the jury should decide.
11 And so they have to deny the directed verdict
12 acquittal, and make that question to the jury.

13 The problem was the question wasn't submitted to
14 the jury, like I asked the judge to do. That's the
15 stronger issue. That's what should have been argued
16 instead of the way that he did it.

17 Q. I'm going to go through your appellate issue.
18 These issues that you said should have been raised on
19 appeal. Concerning the -- let's go to the first one,
20 let me just mention this, can you point out -- do you
21 have have the transcript with you?

22 A. No, I don't.

23 Q. Do you have a copy of the transcript up here?

24 A. I -- just ask the question and see if I can
25 answer it. I'm not going to need it.

1 Q. All right. Can you tell me where in the
2 transcript that you requested that the judge charge the
3 jury on the distinction between larceny and receiving
4 stolen goods, where you requested that he give that
5 charge to the jury?

6 A. It's in the written -- it's in the appendix at
7 page 397. That's the written charge that he asked me,
8 do you have any written charges, and I said yes. And
9 he passed them up. Page 333, lines 4 through 12, I
10 think, something like that.

11 Q. Now, is that a court's exhibit?

12 A. Excuse me?

13 Q. Is that an extra exhibit in the record?

14 A. It's a part of the appendix and summary
15 judgment. It's on file with the Clerk of Court.

16 Q. I'm talking about the actual transcript.

17 A. The transcript is part of the appendix to the
18 summary judgment as well.

19 Q. Okay. In the actual transcript, did you ever
20 ask the court at any point whether or not he would put
21 that issue as to the jury charge?

22 A. It was discussed. I don't know that I used
23 that terminology, but I -- he said do you have any
24 charges. I handed him the written charges that was in
25 there, you know, requesting that those charges be

JAMES TINSLEY -- CROSS EXAMINATION

1 given, and we discussed them. And he said that that's
2 a legal question and --

3 Q. Did he specifically address that issue to you?

4 A. I mean, that's what we were talking about,
5 that issue. He said he couldn't charge it because he
6 said that will be a charge on larceny, and I'm not
7 convicted of larceny -- I'm not indicted for larceny.

8 Q. I understand that's in your appendix that you
9 submitted today with your motion for summary judgment.
10 Now, it's fair to say the appellate defense didn't have
11 that appendix; is that correct?

12 A. If they had the transcript, it's the same
13 transcript.

14 Q. They just had this transcript?

15 A. That they the trial transcript, the same
16 transcript.

17 Q. So what I'm asking is, if you ever raised in
18 this transcript -- and I'm aware that you may have
19 submitted something to the judge, wouldn't that be
20 reflected in this record that the court --

21 A. I think they all -- that -- that record --
22 that request -- written request was filed, and I think
23 the judge made that a part of the record. That was
24 filed, I think, with the Clerk of Court. And it was
25 submitted to them, too, when I wrote him and told him

JAMES TINSLEY -- CROSS EXAMINATION

1 that, you know, this issue needs to be raised and
2 here -- here is where I requested it and all that.

3 Q. I guess what I'm asking is, can you point to
4 the specific part of the transcript where that
5 happened -- where that issue came up during the jury
6 charge -- where you requested a jury charge, or the
7 judge indicated he wasn't going to grant that jury
8 charge?

9 A. Yes, it's in there. I -- I asked him and he
10 said I -- denied. I'm not going to give that charge.
11 He said I've already -- his words was, I've already
12 made that discretion at the directed verdict stage. He
13 said, that's a legal question. I decided that. And
14 that's not a legal question, so he refused to give the
15 charge.

16 THE COURT: Let -- let me -- let me go ahead and
17 ask this question again though -- do you have a copy of
18 the trial transcript over there?

19 A. It's part of the appendix, yes.

20 THE COURT: Could you get that for him please,
21 sir. The State's -- what the State is trying to find
22 out is could you point to the State the page and line
23 number where that issue was addressed?

24 BY MR. SCHMECKPEPER:

25 Q. The reason I'm asking, Mr. Tinsley --

JAMES TINSLEY -- CROSS EXAMINATION

1 A. You want to know if it was preserved. That's
2 the question. So page 333 of the transcript, line four
3 through 12, where he ask me to address the charges.
4 And I handed him -- the charges up to him. It says,
5 "why don't you hand it to Rick over there and he'll
6 hand it up to me and then we'll talked about it". We
7 went -- and we started going through them. And that's
8 the same -- same written request for jury charges
9 that's on page 397. And --

10 Q. Three ninety-seven, is that your appendix or
11 this transcript?

12 A. They are the same. The transcript starts out
13 as the same page number.

14 Q. The reason I'm asking is my transcript ends at
15 388.

16 A. That's the -- the -- the written request is in
17 the appendix not -- to the summary judgment, not the
18 transcript. We continue on over. And at the top, it
19 says -- and the judge is talking. He says, "that's a
20 legal question. I have already made it to directed
21 verdict stage. That's not a jury question, so I'm not
22 going to charge on that. That's the reason I'm not
23 going to charge that. That's a legal question the
24 court made. That's not going to be submitted to the
25 jury. That issue -- you're not even charged with

JAMES TINSLEY -- CROSS EXAMINATION

1 stealing, so there is no way that I can charge that".
2 And -- and so we were discussing the charge about the
3 difference between larceny -- and he seemed to think if
4 he gave that charge, that that would be a charge on
5 larceny.

6 But you're allowed to give a charge -- a charge
7 a person is not indicted for if the purpose of doing
8 that is to help enlighten the jury as to the issue that
9 is before it. And that's why I was asking that that to
10 be -- be charged.

11 MR. SCHMECKPEPER: Beg the court's indulgence.

12 BY MR. SCHMECKPEPER:

13 Q. Concerning your fourth allegation of
14 ineffective assistant of appellate counsel, the trial
15 judge erred in failing to merge -- and I'm
16 paraphrasing -- failing to merge all that into a single
17 offense. Now, you moved that -- you requested that the
18 trial judge merge the offenses; is that correct?

19 A. Yes.

20 Q. And he, in fact, merged some of them; is that
21 correct.

22 A. He merged -- he merged -- he merged two, I
23 think, two, but not the others. And he seemed to think
24 that that was because -- his reason for that was
25 because he didn't believe that the date on the

JAMES TINSLEY -- CROSS EXAMINATION

1 indictment was different, and so he thought that that
2 meant that it was a different event or whatever. But
3 the evidence at trial showed that it was all at the
4 same time. The State argued that it was because of the
5 different victims. But that doesn't matter, it's
6 whether or not you possess it at the same time that
7 counts.

8 Q. Let's go to your next allegation concerning
9 the fourth amendment issue -- failing to conduct an
10 incamera suppression hearing -- what was that issue
11 exactly?

12 A. That I had asked for the court to conduct an
13 incamera suppression hearing regarding the fourth
14 amendment search and seisure issues. And that the
15 court refused to give an incamera suppression hearing
16 about it.

17 Q. It might sound like a dumb question, but I'm
18 just trying to clarify for the record. Where did
19 they -- where -- so the initial search they were
20 trespassing?

21 A. Yes. They had -- they had went to the
22 campsite and --

23 Q. What campsite?

24 A. It's LDM. I was gold mining at the time with
25 Mr. Justice, and I was a member of LDM Lost Dutchman

JAMES TINSLEY -- CROSS EXAMINATION

1 Mining Association. They own some private property
2 that members --

3 Q. So who -- who owned that that property they
4 trespassed on?

5 A. The Lost Dutchman Mining Association.

6 Q. This wasn't your house?

7 A. It was not my house.

8 Q. But was it your property?

9 A. I was a member.

10 Q. But was it your property?

11 A. I had an interest in the property. I
12 didn't -- I don't guess you call me owning it, but I
13 was a member and had an interest in it. And it was
14 posted against trespassing if you're not a member.

15 And they had went on it. They had to hop a
16 fence and go three quarters of a mile down a dirt road
17 back in the woods in order to be able to view the
18 items, so it couldn't be seen from the road or public
19 advantage point was my point.

20 Q. Let's move on for a minute -- the right to
21 counsel. You're saying -- let me -- I'm going to try
22 to paraphrase it that the judge didn't tell you that
23 you did not have a -- the judge didn't give you
24 stand-by counsel; correct?

25 A. Are you talking about the fourteenth amendment

JAMES TINSLEY -- CROSS EXAMINATION

1 lack of resources, or have you moved on to the sixth
2 amendment waiver of the right to counsel? Which one
3 are you talking about?

4 Q. The sixth amendment waiver of right.

5 A. That's the one you want to talk about.

6 Q. Now, your claim is -- now you said -- first
7 off, you know the law -- you knew about the law, and
8 you knew that you had the right to stand-by counsel?

9 A. Correct.

10 Q. So you already knew the dangers of proceeding
11 pro se, you thought you could handle it with stand-by
12 counsel?

13 A. Absolutely. And had I been given --

14 Q. When -- when -- when you first talked to your
15 defense attorney or appointed defense attorney, when
16 you told him I'm going to fire you, how did he respond?

17 A. It's been a long time. I don't remember his
18 exact -- his exact words. It wasn't -- it really
19 didn't go down quite that way.

20 I had filed a lawsuit and he was kind of --
21 didn't want to be a part of it because he didn't want
22 to be associated with a lawsuit. All this stuff, by
23 the way, there's the transcript of this hearing before
24 Judge Maddox and it's part of the appendix as well in
25 my summary judgment, so everything was said there in

JAMES TINSLEY -- CROSS EXAMINATION

1 the record.

2 Q. That's fine. If you have a copy of the
3 transcript, I'm just looking at the first page. Who is
4 Daniel Day?

5 A. That was -- that was a stand-by counsel they
6 appointed who sat by me during the trial.

7 Q. You said you weren't appointed stand-by
8 counsel, just not prior to the trial?

9 A. Prior to the trial, correct, to do research,
10 legal research.

11 Q. So you did have stand-by counsel, you just
12 didn't have it prior to the trial. And your allegation
13 is that your right -- your sixth amendment right to
14 counsel was violated because he didn't have an attorney
15 coming in helping you prior to the trial?

16 A. My -- my right of counsel -- my right to
17 counsel wasn't waived knowingly because it was waived
18 with the understanding that I would be provided with
19 that stand-by counsel to assist me in conducting legal
20 research.

21 Q. Prior to the trial?

22 A. Prior to trial. You have the right to
23 stand-by counsel prior to trial, to help with
24 investigation, and during trial to answer questions. I
25 didn't need it during the trial to answer questions, I

JAMES TINSLEY -- CROSS EXAMINATION

1 just needed it pretrial.

2 Q. But you did have stand-by counsel during the
3 trial?

4 A. I did during the trial. I didn't need it.

5 Q. All right. Concerning the allegation the
6 State withheld information concerning deals for
7 leniency given to the co-defendant for his testimony,
8 you're saying -- I apologize. I'm paraphrasing again.
9 So are you saying that there is some deal that
10 didn't -- that didn't come out at trial?

11 A. I'm saying, yes. I'm saying there's a deal
12 that -- that -- that the motivation -- I'm saying that
13 he lied about the deal, and that had the jury known
14 about that, that goes to his credibility and
15 truthfulness to tell the truth.

16 Q. What did he lie about?

17 A. He said that there was no deals of probation.
18 And that he -- that he wasn't getting anything
19 basically in exchange for his testimony.

20 Q. But -- but you're saying there was a deal for
21 probation?

22 A. There was a deal for probation, charges being
23 dismissed, allowed him to plead guilty to charges to
24 other counties, and all that was a benefit and a value
25 to him that was kept from the jury.

JAMES TINSLEY -- CROSS EXAMINATION

1 Q. All right. So I'm just going to -- I'm trying
2 to find this specific part of the transcript. If you
3 would turn your attention please to page 234 of the
4 transcript, and you said they are saying --

5 A. Uh-huh.

6 Q. Now, you asked Mr. Hughes -- Mr. Justice
7 during your cross examination of him, whether or not
8 there was a deal in place; is that correct?

9 A. Yeah.

10 Q. And he said, line 14, I was -- pretty much
11 take this deal, get a deal -- prior to telling the
12 truth; is that correct?

13 A. He attempted -- he absolutely attempted to
14 tell the truth to begin with. But then the judge
15 stepped in and I guess scared him. He said, oh, no,
16 there's no deal. And I guess he then -- when I asked
17 him again, he lied about it, I guess, because he was
18 scared of what judge the had said. It kind of
19 influenced him somewhat to change his story.

20 Q. Are they talking about -- there was no
21 negotiated deal?

22 A. There was a -- no, that's -- I got the
23 transcript.

24 Q. By negotiated, I mean, the negotiated sentence
25 where the judge wouldn't have any sentencing

JAMES TINSLEY -- CROSS EXAMINATION

1 discretion?

2 A. Well, that's what a deal is when -- when --
3 when -- when -- when a person says I'm pleading guilty
4 to these terms, and he's placing himself in jeopardy by
5 entering the plea, and then judge accepts that
6 agreement -- whether you can call it a recommendation,
7 but if he accepts the recommendation, then the judge is
8 bound by that recommendation because that's what led
9 him to plead guilty.

10 Q. Now, what -- I understand you're -- you're
11 pretty well versed in the law, but do you understand
12 the legal distinction between a recommended sentence
13 and a negotiated sentence?

14 A. Yes. I understand the difference. And this
15 was a negotiated sentence by the way. I mean, the
16 judge even called it negotiated a couple of times on
17 the trial. Mr. Justice's attorney, when he was talking
18 to the court, referred to it as a negotiated sentence.
19 And it was a negotiated -- the judge said himself, if
20 you'll testify against Tinsley and say this, I'll give
21 you that probation. That's the negotiation -- that's
22 the contract with the judge himself, and that all
23 happened before he testified in my trial.

24 Q. Did the sentencing sheet say pursuant to
25 negotiations?

JAMES TINSLEY -- CROSS EXAMINATION

1 A. Are you talking about Justice's sentencing
2 sheet?

3 Q. Yes.

4 A. I don't know what it said.

5 MR. SCHMECKPEPER: I beg the court's indulgence.
6 Your Honor, I apologize, I'm trying to go through these
7 documents as best I can, so.

8 BY MR. SCHMECKPEPER:

9 Q. That's my -- my point is, looking at page 34,
10 the jury did hear that there was some sort of
11 recommendation or negotiation in this actual plea for
12 Mr. Justice for the State. They knew that -- they
13 knew that he was pleading for something; is that
14 correct?

15 A. He -- he initially said that. But then the
16 judge after that fact, you know, started telling the
17 jury that that wasn't true. And that I was trying to
18 mislead the jury by saying that. And that they
19 shouldn't believe anything that I say and all that was
20 a lie.

21 MR. SCHMECKPEPER: Beg the court's indulgence.

22 BY MR. SCHMECKPEPER:

23 Q. Now, let's talk about the next issue where you
24 said the detectives testified at trial they took
25 pictures of the campsite --

JAMES TINSLEY -- CROSS EXAMINATION

1 COURT REPORTER: I'm sorry, what? The defendant
2 testified at trial --

3 BY MR. SCHMECKPEPER:

4 Q. I apologize. The allegation concerning the
5 detective who testified at trial and took pictures of
6 the bill of sales.

7 A. Right.

8 Q. Now, if you could turn your attention to page
9 198, specifically lines 15 through 20.

10 A. Right. Where they placed them into evidence?

11 Q. Correct.

12 A. With no objection; is that what you're trying
13 to get at?

14 Q. Correct.

15 A. Yeah. That's something on my issue --

16 Q. I'm just asking the -- the photographs came
17 into evidence without objection before Mr. Smith ever
18 testified; correct?

19 A. Yeah. This isn't about Mr. Smith though --

20 Q. I'm sorry, before Mr. -- before the
21 detective --

22 A. Scott Arnold.

23 Q. What was his name?

24 A. Scott Arnold.

25 Q. Before Scott Arnold testified as to the

JAMES TINSLEY -- CROSS EXAMINATION

1 pictures, they were already in evidence --

2 A. Right.

3 Q. -- without objection?

4 A. I didn't have it -- I couldn't object. I had
5 not -- what would -- what would I object to? There was
6 no -- I didn't know that he had fabricated those --

7 Q. Now, you're talking about fabrication, this
8 coming from -- where is this coming from, the
9 fabrication allegation?

10 A. Because he claimed that the bill of sales that
11 he was doing an investigation, and he searched the
12 camper and he found them himself, with his own two
13 hands, removed them from the camper. And that they
14 have my name and address on them, and that they -- the
15 State argued that that must show that I had knowledge
16 that they were stolen, because I had created them and
17 put my name on them to show that I had lawful
18 ownership.

19 After the trial, he testified in a deposition
20 that he didn't do any searching of the camper and find
21 any evidence.

22 Q. And how --

23 A. That's when he was lying in my trial when he
24 said that he did.

25 Q. Okay. And how much longer is that -- how long

JAMES TINSLEY -- CROSS EXAMINATION

1 was that deposition after the trial?

2 A. I mean, I don't recall if it's -- part of
3 it -- it's in the appendix or based on it. I'm sure.
4 Probably a year.

5 Q. A year?

6 A. I don't -- I'm just guessing. I don't -- I
7 don't have any idea to be honest with you.

8 MR. SCHMECKPEPER: Beg the court's indulgence.

9 A. It was the 21st day of 2011 when the
10 deposition was.

11 BY MR. SCHMECKPEPER:

12 Q. May 21, 2011?

13 A. December 21st.

14 Q. December 21, 2011. When was the hearing?

15 A. The trial?

16 Q. The trial.

17 A. I'm guessing -- what was that, August?

18 Q. July of 2008; is that right?

19 A. Something like that.

20 Q. This was three years later, the deposition was
21 three years after when he testified. And then when he
22 is actually -- when was he actually in the trailer of
23 the camper?

24 A. He claimed the night that he searched the --
25 when he searched the camper.

JAMES TINSLEY -- CROSS EXAMINATION

1 Q. Do you know when that date was?

2 A. February 29th.

3 Q. It was a good bit before the trial?

4 A. Six months, yeah. Six months.

5 Q. So the deposition took place almost four years
6 after he actually was in this case?

7 A. Right up -- yeah.

8 MR. SCHMECKPEPER: Your Honor, I have no further
9 questions at this time.

10 THE COURT: All right. Then, Mr. Tinsley, do you
11 wish to reply in any way to the cross examination?

12 A. No, sir. I don't suppose I do.

13 THE COURT: All right. You may step down.

14 MR. TINSLEY: Your Honor, do you want me to
15 proceed with the next witness?

16 THE COURT: Let's take a lunch break until 2:00.

17 MR. TINSLEY: Okay.

18 THE COURT: The court will be in recess until
19 2:00.

20 (After a lunch recess, court reconvened.)

21 THE COURT: Are you ready to go ahead?

22 MR. TINSLEY: Yes, Your Honor.

23 THE COURT: Then call your witness.

24 MR. TINSLEY: I call James Douglas Tinsley, Sr.

25 JAMES DOUGLAS TINSLEY,

JAMES TINSLEY, SR. -- DIRECT EXAMINATION

1 SR., having been first duly sworn, testified as
2 follows:

3 THE CLERK: Thank you. Please have a seat around
4 by the witness stand. And once you're seated, if you
5 would please give us your full name for the record.

6 THE WITNESS: James Douglas Tinsley, Sr.

7 THE CLERK: Thank you, sir.

8 DIRECT EXAMINATION BY MR. TINSLEY:

9 Q. Mr. Tinsley, technically are you related to
10 me?

11 A. Yes. I'm your father.

12 Q. Okay. And do you have any other relationship
13 legal-wise to me in some form?

14 A. I have held your power of attorney for a
15 number of years.

16 Q. And -- and in relation to that, have you done
17 legal type things, meetings with people and filed
18 documents, and things of that nature on my behalf?

19 A. Yes, I have. Since your incarceration, I have
20 done those things for you that I could legally, that
21 you were prevented from doing by your incarceration or
22 that was beyond your ability to do.

23 Q. Back in 2008, do you recall trying to recover
24 my property from the Sheriff's Office?

25 A. I was.

JAMES TINSLEY, SR. -- DIRECT EXAMINATION

1 Q. What -- what was it that you did and what did
2 they tell you?

3 A. Well, upon learning that you had been
4 incarcerated in Oconee County, I came to Oconee County
5 to the law enforcement center. I was directed to speak
6 to a Detective Smith, who I believe had the case at
7 that time. And I talked to him at length. He told me
8 about some of the circumstances regarding your arrest
9 the previous evening at the campground, the gold mining
10 campground. And he told me there was a ton of property
11 there, personal property, and that they didn't really
12 know who it belonged to or who -- where it went. And I
13 said, well, anything that he has there that's not part
14 of your investigation, I would like to get that turned
15 over to me. Because he's going to need his -- whatever
16 resources he can muster, he's going to need that. And
17 I'd like to get that turned over to me if possible.
18 And he said, well, we can't do that. At this time, we
19 can't do that.

20 Q. Okay. Were you in the courtroom on the day of
21 my trial?

22 A. I was.

23 Q. Was there anything that you saw in the
24 courtroom that concerned you?

25 A. I never could quite figure out exactly what

JAMES TINSLEY, SR. -- DIRECT EXAMINATION

1 the judge's demeanor towards you was about. I know
2 that judges probably don't like dealing with pro se
3 litigants, especially if they are troublesome, but I
4 never could quite understand why he seemed to be angry
5 towards you from the outset.

6 Q. Okay. What about any comments that were made
7 to the jury?

8 A. Well, when you were trying to cross examine
9 Mr. Justice regarding a plea deal, the judge
10 interrupted and spoke quite loudly, there is no deal.
11 There is no deal. And then he admonished you not to
12 try to mislead the jury.

13 Q. Did you think that was unusual?

14 A. I'm not -- I'm not an attorney. I'm not a
15 legal scholar. As a citizen, I thought it was a little
16 unusual and quite different from anything I had ever
17 witnessed by sitting in a -- as an observer in a
18 courtroom before.

19 Q. Were you present for Mr. Justice's guilty
20 plea?

21 A. I was. I believe that was the day before. I
22 was in the courtroom when Mr. Justice was brought into
23 his guilty plea hearing.

24 Q. During that hearing, did they refer to it as a
25 negotiated guilty plea and a deal with probation?

JAMES TINSLEY, SR. -- DIRECT EXAMINATION

1 A. Actually several different people referred to
2 it as a negotiated plea for probation. One of those
3 individuals was Mr. Justice's attorney, Mr. Gruber
4 Sires.

5 Q. Following the conviction, were you able to get
6 the transcript for Mr. Justice's guilty plea?

7 A. I did. I did get that transcript, yes, sir.

8 Q. Okay. And it showed basically what you said
9 today, that there was -- that was a deal for probation?

10 A. Yes. It showed that my recollections of the
11 words that were spoken were accurate. There was a
12 negotiated plea based upon -- predicated upon the fact
13 that Mr. Justice would testify against you the
14 following day.

15 Q. And that transcript, did you file that as part
16 of the appendix to my summary judgment motion in this
17 case?

18 A. Yes, I did.

19 Q. Okay. Following the conviction, were you in
20 contact with any of the appellate defense attorneys?

21 A. Yes, I was. The one that I had the most
22 contact with was a lady named Celia Robinson. She -- I
23 found her to be very communicative and willing to talk
24 to me. And she talked to me at length on at least four
25 or five different occasions about what her plans were

JAMES TINSLEY, SR. -- DIRECT EXAMINATION

1 for your appeal.

2 Q. Okay. What was your discussions with her
3 about that?

4 A. Well, I asked her, you know, what she -- what
5 she saw. You know, once she got all the information --

6 MR. SCHMECKPEPER: Your Honor, at this point, I'm
7 going to object to this testimony. Ms. Celia Robinson
8 wasn't applicant's appellate counsel. Appellate
9 counsel was Tristan Shaffer, so I'm going to object on
10 the ground of relevance, Your Honor.

11 THE COURT: I'll sustain the objection.

12 BY MR. TINSLEY:

13 Q. All right. After speaking to her, did you
14 ever talk to any other attorney?

15 A. Yes. After speaking with Ms. Robinson,
16 learning that she was no longer at appellate defense
17 due to health reasons, I spoke with Tristan Shaffer.

18 Q. Okay. Did you -- did you tell him anything
19 about the conversations you had with Ms. Robinson about
20 the issues that were supposed to be raised?

21 A. I did.

22 Q. What -- what did you tell him?

23 A. Well, I told him that based on my prior
24 conversations with Ms. Robinson, that she had indicated
25 to me that she was going to brief four or five

JAMES TINSLEY, SR. -- DIRECT EXAMINATION

1 different issues. She was very excited about the case
2 --

3 MR. SCHMECKPEPER: Your Honor, I'm -- I'm -- I
4 apologize to interrupt -- I'm going to object, pretty
5 much all of this is hearsay. Neither of these
6 individuals are here to testify. I'm going to object
7 on the grounds of hearsay.

8 THE COURT: I sustain the objection.

9 MR. TINSLEY: All right. I would just like to put
10 on the record, Your Honor, that he had the opportunity
11 to call them as witnesses. And one of the issues is --
12 that I'm claiming that if they provided ineffective
13 assistance of counsel for not raising any these other
14 issues -- I'm trying to establish that they had
15 intended to raise the other issues, but they -- her
16 medical problem interfered with that. And that's when
17 they had to file it as a single issue.

18 And he's trying to claim that -- the State is
19 trying to claim that that -- is sufficient, not
20 ineffective assistance of counsel because they raised a
21 single issue. So I'm trying to show that they intended
22 to raise these other issues. If he had wanted to
23 contradict it, he could have called the attorneys to
24 testify to that.

25 THE COURT: But his objection is that it's

JAMES TINSLEY, SR -- CROSS EXAMINATION

1 hearsay.

2 MR. TINSLEY: Well, what he said to them is not
3 hearsay. That's his conversation.

4 THE COURT: Yeah. I -- it is hearsay. And that's
5 the ruling of the court.

6 MR. TINSLEY: Okay.

7 BY MR. TINSLEY:

8 Q. Is there anything else that you think is
9 relevant to help us in resolving the issues?

10 A. No. I can't think of any.

11 MR. TINSLEY: No further questions, Your Honor.

12 CROSS EXAMINATION BY MR. SCHMECKPEPER:

13 Q. You mentioned that you thought it was
14 inappropriate what Judge Nicholson said during the
15 hearing regarding the negotiations or recommendations
16 for the sentence?

17 A. I'm sorry. I'm a little bit hard of hearing.

18 Q. I apologize. You mentioned that there was
19 something inappropriate about the way that Judge
20 Nicholson said something to -- regarding Mr. Justice's
21 negotiation during sentencing?

22 A. Yes. I -- I thought it was, yes.

23 Q. Do you know if Mr. Tinsley here objected to
24 that?

25 A. I don't remember if he did or not, no.

1 MR. SCHMECKPEPER: No further questions.

2 MR. TINSLEY: May I?

3 THE COURT: Yes.

4 BY MR. TINSLEY:

5 Q. With regard to that, if -- if I wasn't present
6 for a guilty plea and didn't hear it, and the judge
7 said that there was no guilty plea, would I have had
8 any reason to object?

9 A. You were not present at the guilty plea.

10 Q. So I wouldn't have had any reason to believe
11 the judge was being untruthful?

12 A. No.

13 Q. I had no reason to object to it?

14 A. No, not to my knowledge, no.

15 MR. TINSLEY: No further questions.

16 THE COURT: Thank you. You may step down. The
17 next witness, Mr. Tinsley.

18 MR. TINSLEY: I call Hogan Hugh Justice, III.

19 HOGAN HUGH JUSTICE, III,
20 having been first duly sworn, testified as follows:

21 THE CLERK: Please have a seat in the witness
22 stand. And please state your full name for the court's
23 record.

24 THE WITNESS: Hogan Hugh Justice, III.

25 THE CLERK: Thank you, sir.

HOGAN JUSTICE -- DIRECT EXAMINATION

1 **DIRECT EXAMINATION BY MR. TINSLEY:**

2 Q. Mr. Justice, in 2008, were you charged in
3 Oconee County with five counts of receiving stolen
4 goods?

5 A. Yes.

6 Q. Did you enter some type of plea agreement to
7 those Oconee offenses?

8 A. Not to those, no, I didn't.

9 Q. Were they dismissed?

10 A. Yes.

11 Q. Was that part of the plea deal that those be
12 dismissed?

13 A. Yes.

14 Q. Can you tell us about the negotiations for
15 your deal?

16 A. Well, there's a case precedent in South
17 Carolina, I think it was Rutledge or -- I can't
18 remember the exact precedent, but it basically stated
19 that if an activity occurred in another state, you
20 could plea to it here. And I -- I was concerned about
21 double jeopardy issues. I discussed this with my
22 attorney and he -- he negotiated that they dismissed
23 those charges for receiving, and I would waive
24 presentment on larceny, to them two matters, rather
25 than what they indicted me for.

HOGAN JUSTICE -- DIRECT EXAMINATION

1 Q. And that was part of the agreement?

2 A. Yes.

3 Q. And was there any other consideration for you
4 to probation or anything else?

5 A. I was -- I was informed that they would --
6 they would institute a probationary sentence in
7 exchange from my truthful testimony. That was the
8 arrangement.

9 Q. Did your agreement call for you to receive
10 probation in exchange for testimony?

11 A. That's correct.

12 Q. And the State agreed to nolle process or
13 dismiss the receiving and possession charges?

14 A. That's correct.

15 Q. And your purpose for pleading guilty to the
16 charges that occurred in -- the offenses that occurred
17 in the other counties, was that you were trying to
18 overcome any double jeopardy?

19 A. Well, it -- it was not only another
20 jurisdiction, it was another state.

21 Q. Well, some of the offenses were from another
22 county, too, weren't they?

23 A. I don't believe I was ever charged in another
24 county.

25 Q. You could have been?

HOGAN JUSTICE -- DIRECT EXAMINATION

1 A. It was possible, but I don't believe there was
2 another -- any another interstate South Carolina
3 charge.

4 Q. At that time?

5 A. Right.

6 Q. Was that negotiated plea agreement, was that
7 your motivation for pleading guilty? Would you have
8 pled guilty if it could had just been an open plea and
9 you could have got the maximum sentence, or did you
10 rely on that deal?

11 A. I -- I relied on the communication with my
12 counsellor. And -- and the -- I mean, it was my
13 understanding it was going to be a quid pro quo,
14 probation for -- for my testimony.

15 Q. Okay.

16 A. As a matter of fact, the judge withheld
17 sentencing until after the trial. Although -- although
18 the negotiation and the discussion of the plea occurred
19 prior to your trial, the actual -- my actual sentencing
20 was withheld. They were going to do a -- they were
21 going to do a PETA, probation terminated upon -- upon
22 payment. But they -- in the sentencing phrase, he
23 would not do that -- the judge would not do that. But
24 it was my understanding that, you know, in exchange for
25 my truthful testimony, that they -- that they would

HOGAN JUSTICE -- DIRECT EXAMINATION

1 give me probation. And that's what I did.

2 Q. Okay. These agreements that the prosecutor,
3 David Wagner, was he aware of all this? Was he the
4 prosecutor at your guilty plea as well?

5 A. Mr. Wagner was here this morning. I don't see
6 him now. But Mr. Wagner actually came to the jail
7 house, and he said it's my understanding that you think
8 Mr. Tinsley is going to walk free today. And what do
9 you know about that. I said, well, you know, I think
10 you have charged the man wrong. I told him why. So,
11 he -- he was -- I mean, I was straight forward about
12 everything. And, you know, I don't know about all this
13 other stuff concerning negotiation and all that. I
14 wasn't there. They wouldn't allow me to sit in the
15 trial. I just came in for the sentencing and then I
16 came in for the testimony, and I saw nothing else about
17 that trial.

18 Q. But -- but in fairness, Mr. -- the prosecutor
19 was aware of your plea agreement to probation in
20 exchange for testifying?

21 A. Yes.

22 Q. He was aware that that took place before you
23 testified in my trial?

24 A. Yes.

25 Q. And you -- you placed yourself in jeopardy by

HOGAN JUSTICE -- DIRECT EXAMINATION

1 entering a guilty plea in that trial, in your case?

2 A. Well, yeah, I mean, I gave up my right to
3 confront witnesses against me, I pled.

4 Q. Did the judge tell you, during your plea
5 hearing, that he would accept your agreement and give
6 you the sentence that you asked for if you would
7 testify against me?

8 A. Yeah. He just said that he was going to hold
9 off sentencing until after I've testified. That was
10 the only -- that was the only caveat. He would not
11 sentence me right then. He said -- I think he said
12 that he could leave here, pay off -- pay off the
13 probation, and we'd have no hold on him. So he would
14 not -- he would -- he would not sentence me that day.
15 He waited until I testified and then he sentenced me.

16 Q. So if the prosecutor stated in closing
17 arguments that you was still going to face these other
18 charges in these other counties, that wouldn't have
19 been true?

20 A. No. There were -- there were no charges in
21 other counties in South Carolina.

22 Q. But, I mean, by pleading guilty to the
23 larcenies here, you couldn't be charged for larceny in
24 another county; is that right?

25 A. Well, it was -- it was prohibitive --

HOGAN JUSTICE -- DIRECT EXAMINATION

1 Q. Right. Because --

2 A. -- due to statute and due to -- my
3 understanding of, you know, of -- protection against
4 double jeopardy.

5 Q. Do you recall giving your testimony in my
6 trial where I attempted to question about -- question
7 you whether or not there was a negotiated deal of
8 probation in exchange for your testimony?

9 A. That was in July of '08. So the -- the -- I
10 can't -- I can't say what I said that many years ago,
11 no, I can't. I -- I was aware that it was a negotiated
12 plea. I would assume my testimony would have reflected
13 that.

14 Q. Okay. But if I asked you that and you said
15 there wasn't, that wouldn't be correct; right?

16 A. I'm sorry. One more time.

17 Q. If I asked you if you had a deal with
18 probation in exchange for testifying against me, you
19 said no, that would be incorrect; right?

20 A. Yeah, that would have been incorrect.

21 Q. Is there any reason why you might have said no
22 when you knew that there was a negotiated deal?

23 A. Well, this is kind of way out of the gray
24 matter here, but as a matter of semantics, I think the
25 judge -- like I'm saying, I'm just guessing -- I mean,

HOGAN JUSTICE -- DIRECT EXAMINATION

1 it was a quid pro quo. I knew that if I got up and
2 testified to the truth of the accusation, the truth of
3 what happened, that they were going to honor what we
4 discussed. It was between my attorney -- my attorney
5 and the State and myself.

6 And -- and, you know, I was concerned that if I
7 pled to something that did not happen, that I had no
8 protection against somebody else coming after me. So I
9 asked my attorney, I said, listen I'll do this, but I
10 want you to have these five indictments dismissed, and
11 I'll waive presentment on this other. And that's what
12 we did.

13 Q. And did you -- and did you receive the
14 sentencing that you expected --

15 A. Yes, I did, exactly with the exception of they
16 did not give me PETA. They did not permit me to pay it
17 and walk away. I had to -- I had to remain on
18 probation for almost a full five years and make a
19 restitution.

20 MR. TINSLEY: No further questions.

21 THE COURT: Cross examination.

22 MR. SCHMECKPEPER: Thank you, Your Honor. May it
23 please the court.

24 CROSS EXAMINATION BY MR. SCHMECKPEPER:

25 Q. Do you remember your guilty plea to -- do you

1 remember the guilty plea they're referring to?

2 A. Do I remember it?

3 Q. Yeah. Do you remember it? Do you remember
4 receiving it?

5 A. Yeah. I remember it fairly well. I mean, I
6 remember that, you know, the substance of it.

7 MR. SCHMECKPEPER: I beg the court's indulgence.

8 THE COURT: All right, sir.

9 BY MR. SCHMECKPEPER:

10 Q. You said -- you didn't -- the deal was for one
11 thing, you actually didn't get that deal -- you didn't
12 get a PETA?

13 A. Well, initially the judge -- the judge and my
14 attorney and -- we discussed it the day prior -- I
15 believe it was the day prior to trial, Jimmy's trial.
16 And probation to be terminated upon paying of the
17 restitution was in that agreement. And everything that
18 was discussed, with the exception of that, I received.
19 But I did not -- the judge, he seemed almost hostile at
20 the actual sentencing, the day that I was sentenced.
21 He seemed like, I think -- somehow, I remember him
22 saying something like I'm not going to do that, and he
23 didn't do the PETA. But everything else that had been
24 discussed we -- came to fruition.

25 MR. SCHMECKPEPER: Your Honor, I have no further

1 questions.

2 THE COURT: Redirect?

3 MR. TINSLEY: Nothing further, Your Honor.

4 THE COURT: Let me ask you a question, Mr.

5 Justice. The testimony that you gave in Mr. Tinsley's
6 trial on July 28, 2008, was supposed to be truthful for
7 you to get your PETA?

8 A. That's correct.

9 THE COURT: Was it truthful?

10 A. Yes, Your Honor.

11 THE COURT: All right, sir. Thank you. You can
12 step down. Any more witnesses?

13 MR. TINSLEY: No, Your Honor.

14 THE COURT: The applicant rests.

15 MR. SCHMECKPEPER: Your Honor, the State rests at
16 this time.

17 THE COURT: Okay. Let me -- one of the things
18 y'all -- y'all keep talking about are things that have
19 been attached to the applicant's motion for summary
20 judgment; do you have that?

21 MR. SCHMECKPEPER: Yes, Your Honor. Apparently,
22 it goes to the appendix, and there are a bunch of
23 attachments including a guilty plea transcript. Again,
24 Your Honor, I didn't attach that. I didn't put that in
25 your judge's packet. Because at the time, the

1 applicant was represented by counsel, so it wasn't in
2 compliance with Rule 11.

3 THE COURT: Well -- all right. Okay. All right.
4 Each side gets 10 minutes to argue their positions on
5 the case. I think I have already heard most of
6 everybody's position, but I want to make sure. Mr.
7 Tinsley, you get to go first.

8 MR. TINSLEY: All right. There is not really a
9 whole lot else to say, Your Honor. There is not a lot
10 of, you know, disputed facts in the case. It's pretty
11 simple about just applying the law in the situation.

12 And I believe, you know, it was ineffective
13 assistance of counsel because counsel failed to do all
14 these things that the law says is reversible error.
15 And that that's inherently prejudicial not to have
16 raised them. And that's all you have to show is that,
17 you know, a deficient performance and prejudice, and I
18 believe we've done that.

19 And the -- the other issue that is kind of
20 complicated without you seeing the case law, that's the
21 reason I wanted to -- you know, for you to review the
22 summary judgment motion and the appendix, but also you
23 could see all the case law that's -- you know, that's
24 on file with the clerk's office about these issues.

25 And it might even be best that -- that maybe we

1 file a post hearing brief or something on all of the
2 issues so we can present some of the case law that
3 might benefit the court in constructing an order in the
4 case.

5 But I believe that because Mr. Justice testified
6 and said that he did not have a deal, that that
7 influenced the jury and misled the jury concerning Mr.
8 Justice's truthfulness and character, and that should
9 have been provided to me. And it should have been
10 corrected when he give that false statement.

11 They knew there was a deal. It was a part of
12 the transcript from when the judge and the Solicitor
13 and everybody indicated to the jury that there wasn't.
14 I had no reason to doubt them. They were the judge and
15 the Solicitor. They were present there. I wasn't
16 present. I didn't know whether they was telling the
17 truth or not. It was only afterwards when I got a
18 transcript that I found out that they had been
19 deceitful to the jury and misled the jury, and made
20 comments that influenced the jury's opinion of Mr.
21 Justice's truthfulness and credibility.

22 And I think I should have been allowed to
23 present that evidence and make those arguments based on
24 that, and I wasn't. And I believe that all of these
25 things together denied me of a fair trial and a fair

1 opportunity to defend myself.

2 THE COURT: All right. Thank you, Mr. Tinsley.
3 Mr. Schmeckpeper.

4 MR. SCHMECKPEPER: Yes, Your Honor. May it please
5 the court. Concerning the allegation of ineffective
6 assistance of counsel, I don't think the applicant has
7 met his burden. I can go through each issue
8 individually, if Your Honor would like to do that, I
9 would prefer to go ahead and brief those issues because
10 there are about six of them.

11 My position is that the issue that the applicant
12 claims is the strongest, the trial judge erred in
13 failing to charge the jury the distinction between
14 larceny, receiving stolen goods, as a need for being
15 preserved for review. And that appellate counsel
16 couldn't have been deficient and failed to raise it.
17 Because it was -- it didn't have any merit and it
18 wasn't preserved.

19 And, again, I can go through the rest of them if
20 you would like. I prefer to do -- do that in writing
21 or just to -- to hear me talk about it.

22 Concerning the issue that the applicant was
23 denied the right --

24 COURT REPORTER: I'm sorry, concerning?

25 MR. SCHMECKPEPER: Yes, ma'am. Concerning the

1 allegation that applicant was denied the right to
2 counsel, his sixth amendment was violated, I think his
3 testimony pretty clearly refutes that. The applicant
4 admitted he was fully aware of the dangers of self
5 representation. He has got a solid understanding of
6 the law, and I believe the record reflects that he's
7 representing himself today, so -- he says the only
8 issue there was he believed he had a right to stand-by
9 counsel.

10 Your Honor, so I would say that that shows
11 that -- that -- that applicant's testimony adequately
12 precludes a finding of failure to advise his right to
13 counsel or -- or that he was denied the right to
14 counsel because he did not knowingly, intelligently,
15 voluntarily waive it.

16 Concerning the allegation that he didn't have
17 the necessary resources, including didn't have stand-by
18 counsel -- or in his testimony to the effect that he
19 did have stand-by counsel at trial. Moreover -- I beg
20 the court's indulgence -- the sixth amendment doesn't
21 require stand-by counsel. Looking at United States vs.
22 Lawrence. It's a fourth circuit case, 161 F 3d 250,
23 the sixth -- the sixth amendment doesn't require a
24 right -- doesn't right an applicant -- or a criminal
25 defendant receives stand-by counsel.

1 Concerning his next allegation, it wasn't denied
2 summarily, that the state withheld information
3 concerning deals for leniency. Your Honor, I'm not
4 sure how to approach that. I don't think we've gotten
5 any -- I don't think applicant has presented what he
6 was provided in discovery. I don't think he's given
7 any evidence the State's suppressed that. All we
8 really have here is evidence that the applicant raised
9 this issue at trial. That the trial judge corrected
10 him on the record. He didn't object to that
11 correction.

12 Your Honor, I would say this isn't a Brady case,
13 but I'll be happy to brief that issue if Your Honor
14 requests.

15 THE COURT: Well, you know, it's really -- isn't
16 it -- they did discuss it during the trial of the case;
17 did they not?

18 MR. SCHMECKPEPER: Yes, Your Honor. That --
19 that -- that issue was before the jury. The jury heard
20 that issue. And I think the only distinction is --
21 that was made was recommendation vs. negotiations.
22 There very well could have been, but I don't know if
23 the record reflects -- I don't think this has been
24 proven. There very well could have been negotiations
25 that it would be a recommended sentence. I think the

1 sentence implies that it was a recommended sentence.

2 THE COURT: But didn't you earlier say that the
3 transcript of that -- of Mr. Justice's guilty plea
4 indicated it was a recommendation?

5 MR. SCHMECKPEPER: Yes, Your Honor. And it sounds
6 like Mr. Justice even said that he didn't -- the judge
7 didn't fully abide by the recommendation. The
8 negotiated plea at sentencing is binding, and I don't
9 think it is in his discretion for negotiation, you
10 either take it or leave it.

11 As far as -- as far as whether there were
12 negotiations that weren't disclosed to the applicant, I
13 don't think he's shown that to the court today. I
14 don't think he's produced what he was given in
15 discovery or what -- anything that was withheld in
16 discovery as far as the Brady Rule 5.

17 THE COURT: Well, I thought that the applicant --
18 what Mr. Tinsley was talking about, when he said a
19 Brady violation, I think he was talking about the deal;
20 isn't that it? Well, go ahead.

21 MR. SCHMECKPEPER: Yes, sir.

22 THE COURT: I don't think he was talking about
23 other -- other things. I think he was talking about --

24 MR. SCHMECKPEPER: The existence of the actual
25 deal, Your Honor.

1 THE COURT: Right.

2 MR. SCHMECKPEPER: I'll be happy to brief that
3 issue. Concerning the issue of the photographs, again,
4 those photographs came in without objection by the
5 applicant. I don't think -- I think -- I think I have
6 covered everything, Your Honor. But obviously, if you
7 have any questions, I'll be happy to answer them.

8 THE COURT: Well, if -- the issue about the deputy
9 saying in the trial of the case that he did seize these
10 items at Mr. Tinsley's property, and then later say he
11 didn't -- well, I mean, that's -- that's -- that's
12 actually two conflicting sworn statements. I mean, on
13 the one time he says this under oath, another time he
14 says this under oath -- anyhow, go ahead. I
15 interrupted you again.

16 MR. SCHMECKPEPER: No, Your Honor. And, Your
17 Honor, in respect to that, my position would be that
18 the deposition took place a number of years after the
19 actual trial took place. You know, the questioning at
20 the deposition didn't specifically focus on what he did
21 inside the camper, I don't believe. My position would
22 be that he very well just may not have thought about
23 it, may have forgotten. It was a long time between the
24 -- when he actually was in the camper and when he
25 actually took a deposition.

1 THE COURT: All right. And so you want to file a
2 post trial brief on these issues to make sure you have
3 got them all covered?

4 MR. SCHMECKPEPER: Yes, Your Honor, if the court
5 would accept that. I would probably prefer to order
6 the transcript and then file a brief -- or file a
7 proposed order on the transcript -- based on the
8 transcript.

9 THE COURT: All right. Well, if you're going to
10 do that -- I understand one of the problems Mr. Tinsley
11 has is in -- on occasion having trouble getting
12 materials and the ability to respond. All right. Let
13 me give the State 30 days to file their brief -- their
14 post trial brief. They'll respond to -- not just what
15 was happening today, but what has been, I guess, in the
16 attachments to the summary judgment motion.

17 It's my understanding that Mr. Tinsley, on these
18 issues, he has already filed what amounts to briefs
19 with his motion for summary judgment.

20 MR. TINSLEY: I'll argue them, but there's -- I'm
21 sorry. I'll argue them, but a couple of issues that
22 were new, that were -- came up after I filed the
23 summary judgment motion --

24 THE COURT: Well, that's what I was getting around
25 to -- is that if you have already argued them in a

1 written format, you -- you don't have to redo it all.
2 But if there is something you need to respond to new
3 that the State mentioned in their brief, then you
4 should respond.

5 How long do you think it will take you to
6 respond? In other words, he'll have -- he'll have to
7 send a copy to you the same way he sends a copy to me.
8 So --

9 MR. TINSLEY: And he's ordering the transcript of
10 this hearing? Is that what you -- is that what you
11 said you were going to do?

12 MR. SCHMECKPEPER: Yes, Your Honor. I was
13 planning on forwarding the transcript of this --

14 MR. TINSLEY: I need a copy of that as well.

15 MR. SCHMECKPEPER: I can order an extra copy for
16 Mr. Tinsley.

17 THE COURT: Okay.

18 MR. TINSLEY: And other than that, it will
19 probably take me a week to respond to it, and a week to
20 mail to it my daddy, to get copies, and you know -- two
21 or three weeks. If you gave 30 days, give me 30 days
22 --

23 THE COURT: Give you 30 days.

24 MR. TINSLEY: Something like that. I shouldn't
25 have no problem.

1 THE COURT: Thirty-thirty.

2 MR. SCHMECKPEPER: Your Honor, that's 30 days
3 after receipt of the transcript?

4 THE COURT: After receipt of the transcript --

5 MR. TINSLEY: Thirty after he files his?

6 THE COURT: Right.

7 MR. TINSLEY: That's fair.

8 THE COURT: All right. Anything else?

9 MR. SCHMECKPEPER: Nothing, judge.

10 THE COURT: Anything else?

11 MR. TINSLEY: No, sir.

12 THE COURT: The court is adjourned.

13 MR. TINSLEY: Thank you, judge.

14 THE COURT: Yes, sir.

15 (Whereupon, the hearing adjourned.)

16

17 * * * END OF TRANSCRIPT * * *

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19

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CERTIFICATE OF REPORTER

I, SHARON D. JONES, CERTIFIED COURT REPORTER,
DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE,
ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF
THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF
COMMON PLEAS FOR ANDERSON COUNTY, SOUTH CAROLINA, ON
THE 10TH DAY OF FEBRUARY, 2016.

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

3.7.16

Sharon D. Jones

SHARON D. JONES,
CERTIFIED COURT REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

JAMES TINSLEY, # 171943,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

In The Court of Common Pleas

2016 FEB 23 A 11: 29

CASE NO: 2013-CP-37-272

2014-CP-37-737

SUPPLEMENTAL AFFIDAVIT OF JAMES TINSLEY
IN SUPPORT OF APPLICANTS MOTION FOR
SUMMARY JUDGMENT

COMES NOW, James Tinsley, # 171943, affiant, being competent to testify and having first hand knowledge of the facts contained herein, states under the penalties of perjury, that the following facts are truly stated so help me God:

1. Your affiant states that he is the applicant in the above entitled action and that in 2008 he was staying with a friend, Hogan Hugh Justice, III, at a gold mining campsite in Oconee County. Mr. Justice asked affiant to help him sell some ATV's on affiant's eBay website that Justice claimed he had purchased at a Government IRS seizure auction in Atlanta, Georgia. Affiant started selling them for Justice but in late January, 2008 affiant abandoned any further involvement with selling the ATV's because affiant became suspicious of the circumstances and story Justice was then giving affiant which kept changing.

2. On the day your affiant was arrested, police seized all of your affiant's property including two vehicles, \$ 29,000.00 in cash, 62- one ounce vials of gold (valued at over \$58,000.00) and other personal property. Affiant requested several times to have his property released to his family so it could be used or sold to raise money to make bond, conduct trial preparations and to hire an attorney. The County refused to return the property and affiant was forced to file a Federal Law suit seeking the return of the property. This seemed only to anger the police and Solicitors Office for they went to Justice and even though he had a long criminal record, offered him a deal to probation if he would implicate affiant in the crimes. Police Detectives also fabricated bill of sales to use during the trial which they claimed had affiant's hand writing on them and made the argument that affiant had created the bill of sales in an effort to claim lawful ownership and that that demonstrated that affiant had knowledge the goods were stolen.

3. This was not the only misconduct that took place in affiant's case. There were other interferences that deprived affiant of a fair trial. Prior to trial affiant was in the County jail and he sought to represent himself with the assistance of stand-by counsel because his incarceration rendered his ability to interview witness and conduct legal research impossible. Affiant made this choice because he had a detrimental reliance on prior South Carolina Supreme Court case law that indicated that he had a right to stand-by counsel even if he represented himself. The court refused to provide stand-by counsel or any other method of pretrial preparation under the faulty belief that it would constitute "hybrid representation". Affiant continued to complain and requested again that stand-by counsel be provided and that it was not going to be used in a manner that would constitute "hybrid representation" but his requests went unanswered. Affiant contends that this not only deprived him of due process and equal protection of the law by failing to provide him with resources necessary to conduct his defense, but, that it also rendered affiant's waiver of his right to counsel invalid because he did not understand the consequences of his desire to represent himself to include the danger that he could be forced to represent himself without any legal research resources whatsoever. Had affiant known that

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he would not have requested to represent himself. Affiants repeated requests and objections to not being provided with stand-by counsel should have placed the court on notice that affiants desire to represent himself was not knowingly, intelligently and voluntarily made, because he was making it clear that his desire came with a condition that he be provided with stand-by counsel which was not being met by the court.

4. Affiant was charged with receiving and possession of stolen goods and vehicles which requires proof that affiant received the goods from someone else who stole them. The evidence at trial created a dispute as to whether affiant was a receiver or the thief. Affiant presented written requests for jury charges and asked the court to instruct the jury that a dispute existed, that they were required to make the determination and if they found that affiant were the thief, that they must find affiant not guilty of the indicted offense. The judge refused to give the requested charge that was supported by the record and evidence. Affiant contends this was an abuse of discretion and denied him a fair trial because the lack of proper instructions by the court allowed the jury to assume they were authorized to convict affiant even if he were the thief who stole the goods himself.

5. Likewise, affiant was surprised by the States evidence and arguments at trial. Affiant was indicted for receiving stolen goods and the notice from the indictments caused affiant to be prepared to defend against a claim that he had received the goods from someone else who stole them, but at trial the States evidence and arguments were based on claims that affiant had stolen the goods himself. Affiant contends that this variance between the indictment and evidence at trial deprived him of due process of law. Affiant was denied true notice of what he must be prepared to defend and he was essentially convicted of larceny a crime he had never been indicted for and based on evidence and facts that were never presented to nor considered by the grand jury that indicted affiant.

6. Affiant contends he was denied due process of law because the judge refused to charge the jury with "mere presence" and "abandonment" even though the evidence and issues in the case supported the charge. Affiants testimony alone established that he did not steal the goods and had no knowledge of their stolen character. Affiant testified that he only helped Justice sell the ATV's on his eBay website and abandoned any further involvement with them once he became suspicious of them.

7. Affiant contends his constitutional and statutory rights were denied him when the judge failed to merge all of the indictments into a single offense. Affiant contends that the possession of multiple stolen goods at a single time constitutes a single offense as the number of indictments do not necessarily constitute the number of offenses. Affiant requested that the charges be merged but the judge refused to merge all of the indictments and then gave affiant consecutive sentences in violation of double jeopardy.

8. Affiant contends that he was denied a full, fair and adequate opportunity to address his Fourth Amendment claims. Affiant had filed a motion to suppress evidence that had been seized. The trial judge refused to conduct an in camera suppression hearing and made affiant present his arguments during the trial. This prevented affiant from presenting his own testimony, witnesses and evidence in support of his claims. The police officers testified that they went to the campground and saw the stolen items in plain view and then they left to go get a warrant. Had affiant been able to present his own evidence, it would have demonstrated that the campsite was privately posted against trespassing and that police had to enter a fenced area and drive 3/4 of a mile down a dirt driveway in the woods in order to view the items. In other words, police were not in an area where they had a lawful right to be when viewing the items and the items could not be seen from a public vantage point. Moreover, when police left to get the warrant, they failed to inform the magistrate that they had already violated the Fourth Amendment in order to learn the information to support the warrant. Had the magistrate known that, he likely would have refused to sign the warrant.

9. Affiant contends that he was denied due process of law where he was convicted based on an unlawful indictment that was not issued by a legally constituted grand jury. Affiant contends that

under S.C. Code, § 14-9-210 and the South Carolina Constitution a grand jury must convene during a term of General Sessions court and under a presiding judge of the Court of General Sessions. The indictments allege that the indictments were true billed on "May 27, 2008 before a Court of General Sessions". Affiant attempted to get the grand jury impaneling documents prior to his trial but the clerk of court told him they were private and that he was not entitled to them until after his conviction in order to prepare his PCR. Affiant was left to assume the information in the indictments were truly stated. Following the conviction, affiant obtained the records for the grand jury proceedings and other records from the clerk of court which demonstrated that there had been no Court of General Session on May, 27, 2008 and therefore the grand jury could not have convened during a term of General Sessions Court. The records further indicate that the State attempted to imply that the grand juries actions had been presided over by a judge by having a judge sign off on the grand juries action several weeks later on June 9, 2008. The records indicate that this was done this way because of a scheduling conflict. The conflict was that the grand jury was attempting to convene at a time when there was no General Sessions Court in session and no presiding judge to oversee their actions. Had affiant known of the false information and the denial of his due process rights, he would have objected prior to the verdict of the jury. Affiant contends that he is entitled to be excused from any procedural default because he was misled by the false information provided to him by the assistant solicitor in the indictment and could not have known of the factual or legal basis of the claim in time to enter an objection at trial.

10. Affiant contends that he was given a disparate sentence in retaliation for his legal activities. As shown above, the trial judge, solicitor and detectives took every opportunity to interfere with affiants ability to fairly defend himself. They refused to provide research resources or stand-by counsel. They refused to conduct in camera suppression hearings. They refused to give proper instructions to the jury. They deprived affiant of access to expert witnesses who's testimony may have helped to prove affiants innocence and they fabricated evidence to make affiant look sinister and guilty. Affiant contends this was done because they were angry at him for filing a federal law suit seeking the return of his property and because he had exercised his right to self-representation and to a jury trial. The Court gave affiants codefendant, Hugh Justice, probation even though he had a 19 page criminal history. Affiant was given two seven (7) year sentences ran consecutively for a total of fourteen (14) years for doing according to Justice and the State, the exact same thing. Affiant had no criminal record and the fact that he was given more time than the maximum he could have received on a single offense, indicates that the trial judge was punishing affiant for doing what the law plainly allows. Moreover, there is no identifiable conduct on the part of affiant that would indicate that a harsher sentence was justified. No indication affiant was armed with a deadly weapon during any crime or that he committed violent acts supporting additional punishment. Under these conditions, affiant contends the court must presume the judge was acting vindictively or with prejudice or a corrupt motive.

11. Following affiants arrest, he was provided with an initial disclosure of evidence that did not include any bill of sales. A few weeks prior to trial, and after affiant had filed for Summary Judgment in the Federal case, the State provides an additional disclosure. This time they claim affiant had created bill of sales with his name on them. Affiant immediately sought a continuance and funds for an expert to establish that the hand writing was not affiants. Affiant believed the police detectives had fabricated the bill of sales just prior to trial in an attempt to establish that affiant knew the goods were stolen in hopes that if affiant were convicted, it would result in the federal suit being dismissed under Heck v. Humphreys. The trial judge refused to give a continuance or funds for an expert and this denied affiant a fair trial. Affiants claims that police had fabricated the bill of sales themselves must have seemed weak to the jury. With the services of an expert, affiants arguments might not have seemed so weak. The trial judges actions in this case prevented affiant from putting up what could have been a very strong defense.

12. Affiant contends that many of the issues should have been raised on direct appeal. They were preserved by motion or by objection and were proper for direct review. Affiant attempted to proceed pro se on appeal but the court refused to allow him to do so. Affiant then sent his proposed issues to appellate defender Celia Robinson and asked her to brief all of the issues. Ms. Robinson said that she would, that she thought all of the issues were strong, but then she had surgery and had forgotten to place affiant's brief due date into her calendar. On the day it was due, the clerk of court contacted her and informed her the brief was due that day. Ms. Robinson rushed to brief a single issue so she could meet the deadline. The decision not to raise other issues was not the result of a professional decision, but rather, a mistake. The case was then reassigned to attorney Tristan Shaffer. Mr. Shaffer refused to amend the brief or add any additional issues. Affiant wrote Mr. Shaffer and warned him that the issue that had been raised was very weak. Affiant stressed that the court would likely uphold the decision to deny directed verdict, not because the judge was right about how the law applies, but because there was a dispute as to whether affiant was a thief or a receiver and the jury would be entitled to make that decision. I asked Mr. Shaffer to amend the brief before oral arguments and to include the additional issues but he refused. This decision does not seem to be the result of a professional decision but rather some sort of professional courtesy, whereby incoming attorney's do not review prior briefs or issues raised by an outgoing attorney. The issues that were not raised are stronger than the issue that was raised. In each of the cases, the South Carolina Supreme Court has previously held that it is reversible error to fail to give the requested charges, etc. Because it has previously been held to be reversible error, affiant contends that it was inherently prejudicial not to have raised the issues on appeal.

13. Affiant contends that his convictions were obtained in violation of due process of law because the State relied upon known false testimony and fabricated evidence to mislead the jury concerning affiant's guilt. Mr. Justice testified that affiant and himself went and stole all of the property together. Outside the presence of the jury, the solicitor told the judge that Justice was lying when he claimed affiant had help steal the property. Yet in front of the jury during closing arguments, the solicitor stated that Justice was telling the truth and that they should convict affiant because Justice had said that affiant had helped steal the property together. During the trial Detective Arnold testified that he took photos of the campsite and the inside of the camper and had discovered the mysterious bill of sales therein with affiant's name and address on them. Following the trial, Arnold testified in his deposition in the federal case and admitted that he did not take any photos, did not search the camper and did not discover any potential evidence therein. The solicitor knew or should have known that Justice and Arnold had committed perjury and he allowed the false testimony to go uncorrected during the trial because it created a false impression of affiant's guilt.

14. Affiant contends that his due process rights were violated by the prosecutors misconduct in failing to provide affiant with Brady materials concerning deals for leniency made with Hugh Justice in exchange for his testimony against affiant and in the prosecutors failure to correct false testimony when it occurred and by providing false statements to mislead the jury himself. Prior to the trial in affiant's case, Hugh Justice plead guilty in exchange for having 5 charges dismissed, being allowed to plead guilty to larcenies in Oconee that took place in other Counties and for probation, in exchange for his testimony implicating affiant. During the trial affiant questioned Justice about any deals he had in exchange for his testimony. Justice attempted to down play his agreements as nothing more than conversations that could not be enforced. At the time of Justice's testimony in affiant's trial, Justice had already plead guilty-placing himself in jeopardy- and the judge had already accepted the plea and the terms of the agreement if Justice would testify in affiant's trial and give the same testimony given to the judge. None of this was provided to the defense and it was a lie for Justice to down play his sentencing agreement. Justice had already placed himself in jeopardy and the court had accepted the plea deal. The court could have rejected the deal before, but not after, Justice had performed by pleading guilty and giving the testimony in affiant's trial.

This false testimony created a false impression of the motivation for Justices' testimony and the prosecutor knew it was false and allowed it to go uncorrected. Moreover, in closing arguments the prosecutor bolstered Justices' false testimony by stating or implying that Justice had only been given a recommendation and that the judge could give Justice a sentence of more than probation. He suggested that Justice had told the truth when the prosecutor knew he had not. He implied that Justices' testimony placed him in further jeopardy because he would now have to face prosecution in the other Counties. This was false. Justice plead guilty in Oconee County to the larcenies that occurred in other Counties. The other jurisdictions were then prevented from prosecuting Justice under double jeopardy. The prosecutors comments suggested that Justice would have no motivation to lie and cause additional prosecutions against himself, when the truth was Justice was highly motivated to testify and make his testimony seem useful, because his deal prevented prosecution on 5 charges that had been dismissed, prevented further prosecutions in other jurisdictions and allowed him to escape a possible 150 year sentence with only probation.

15. Further Affiant Sayeth Not.

February 4, 2016

James Douglas Tinsley, Sr.
 s/ James Tinsley, # 171943
 Trenton C.I. 3-C-11
 84 Greenhouse Road
 Trenton, S.C. 29847

AFFIANT ASSERTS THAT THE ABOVE FACTS ARE TRULY STATED

UNDER THE PENALTIES OF PERJURY.

CERTIFICATE OF SERVICE

I, James Douglas Tinsley, Sr., hereby certify that I did cause the foregoing to be served upon counsel of record this 8th day of February, 2016, by placing a true and correct copy in the United States Mail, with proper postage affixed thereto and addressed as follows:

WALT WHITMIRE
 Assistant Attorney General
 P.O. Box 11549
 Columbia, S.C. 29211

James Douglas Tinsley, Sr.
 s/ James Douglas Tinsley, Sr.

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

JAMES TINSLEY, # 171943,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

) In The Court of Common Pleas

) TENTH JUDICIAL CIRCUIT

) CASE NO: 2013-CP-37-272

) 2014-CP-37-737

) APPLICANTS OBJECTION AND MOTION FOR

) RECONSIDERATION OF THE COURTS DECISION

) TO GRANT THE STATE PARTIAL SUMMARY JUDGMENT

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2016 MAR -7 A 11:05

On February 10, 2016, a hearing was held before the Honorable Brooks Pope Goldsmith, into applicants previously filed motion for summary judgment. At the conclusion of the hearing, the court granted the State partial summary judgment on two issues. Applicant believes the court had made an erroneous finding of fact or a misapplication of controlling case law in making its decision. In order to ensure that his claims - both Federal and State - are preserved for future review, applicant is providing this analysis and request for reconsideration of the courts previous ruling.

ISSUES

I. APPLICANT WAS GIVEN A DISPARATE SENTENCE IN RETALIATION FOR HIS LEGAL ACTIVITIES.

It appears the courts justification for granting the State partial summary judgment on this issue stems from a belief that "a sentencing court has broad discretion in sentencing within statutory limits". While true, what is missed here is that applicant was not sentenced within Statutory limits. The Statute provides for a maximum of ten (10) years for receiving stolen goods and applicant received a total of Fourteen (14) years. The Statute also prohibits multiple convictions for the possession of multiple stolen items at one time. The judge allowed applicant to be convicted of multiple counts of possessing the same goods at the same time. This too, constitutes a sentence outside the "Statutory limits".

Applicant contends that he was vindictively given a harsher sentence than his co-defendant in retaliation for his legal activities. Both applicant and his co-defendant, Hogan Hugh Justice, III, were charged with one count of possession of a stolen vehicle and four counts of receiving stolen goods. At the time of the arrests, police seized applicants vehicles, cash, gold, and other property that was not evidence of a crime and which was not authorized for seizure by any warrant. (SEE: Supplemental

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Affidavit of James Tinsley in support of Summary Judgment, dated February 4, 2016, ¶¶ 1-2). Applicant made several requests for the return of his property but was refused. Applicant was left with no other avenue than to file a civil action seeking the properties return. (Id. ¶ 2).

Applicant contended that the State was prosecuting him in retaliation for bringing the Federal law suit and that Justice had been approached by those with a vested interest in the outcome of the civil suit with an offer of leniency if Justice would implicate applicant in the crimes. Justice accepted the negotiated deal and testified that both he and applicant acted together to steal the goods in question. Justice had a lengthy criminal record and applicant had no felony criminal convictions. Nevertheless, Justice was allowed to plead guilty to probation.

Applicant maintained that he was innocent - that the prosecution was motivated by the Federal law suit and Justices' testimony was motivated by the lenient plea deal. Applicant sought a jury trial and the right to represent himself. Applicant was convicted of the same acts as Justice but was sentenced to two ten (10) year sentences, suspended to seven (7) years each and ran consecutively for a total of Fourteen (14) years.

Applicant contends that these lengthy consecutive sentences violate equal protection of the law, constitute disparate sentences in light of the sentence given to applicants co-defendant, and constitutes a vindictive sentence in retaliation for applicant having exercised his rights to a jury trial, to self-representation and to redress of grievances for the return of his property.

The sentencing court is allowed broad discretion in sentencing within statutory limits, but is still subject to scrutiny if the sentence is the result of prejudice, pressure or a corrupt motive. Garrett v. State, 465 S.E.2d 349 (1995)(citing Wood v. State, 184 S.E.2d 702 (1971)). Under the Federal Constitution the courts have held that actual vindictiveness is shown if a defendant is penalized for asserting his legal rights. United States v. Nichols, 937 F.2d 1257 (1991); See also: Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)(to punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort").

In United States v. Goodwin, 457 U.S. 368, 373-74 (1982), the court noted that an improper vindictive motive should be "presumed" if a judge has taken action detrimental to the defendant "after" he

exercised a legal right. Whenever a judge imposes a more severe sentence upon a defendant, the reasons for doing so must be based upon "objective information concerning identifiable conduct on the part of the defendant" and must be made a part of the record.

Here, there was no objective information that concerned identifiable conduct on the part of the applicant that might have warranted giving him a harsher sentence than his co-defendant and there is nothing in the record to support the judges' decision to give applicant a sentence more than the maximum allowed by law or that the judge was justified in allowing applicant to be convicted of multiple counts when the Statute clearly establishes that a defendant may only be convicted of a single count even if he possesses multiple stolen items at one time. If Justices' testimony and the States' arguments were taken as true, they claimed the conduct of the two were the same - that both acted together to steal the items. There is nothing in the record that suggests applicant was more violent or possessed a handgun during the commission of the crimes or committed some act justifying a harsher sentence. If anything, Applicant should have received a lesser sentence than Justice, because applicant had no prior felony criminal record and Justice had a lengthy criminal record.

On the other hand, there is some indication that the trial judge was prejudiced toward applicant for his legal activities or was acting under pressure or due to a corrupt motive to ensure applicants conviction to help his friends who were being sued by applicant in Federal court. The judges' actions suggest that the preponderance of the evidence shows that he was attempting to vindictively punish applicant for exercising his rights or in retaliation for his legal activities. There is no legitimate justification for the judges treatment of applicant, his rulings on issues raised during the trial that were clearly contrary to prior case law and were an attempt to ensure that applicant was convicted.

Moreover, the convictions for "receiving" and "possession" of the same goods violated the Federal Constitutions ban on Double Jeopardy. Ball v. United States, 470 U.S. 856, 861 (1985)(a defendant may not be convicted of both "possession" and "receiving" the same handgun); United States v. Kaplan, 588 F.2d 71 (4th Cir. 1978)(Although one may be convicted for both possession and manufacturing of illegal firearms, court may not impose total sentence exceeding maximum penalty provided for one violation). Likewise, receiving stolen goods and possession of a stolen vehicle have the same elements and are not

separate and distinct offenses under United States v. Blockburger, 284 U.S. 299 (1932). In Brown v. Ohio, 97 S.Ct. 2221, 2225-26 (1977), the Supreme Court held that separate statutory crimes need not be identical - either in constituent elements or in actual proof - in order to be the same within the meaning of the constitutional prohibition. Here, applicant could have been charged under receiving stolen goods instead of possession of a stolen vehicle for the trailer which could be considered a "vehicle" or "stolen goods". The judge conspired with his friends to try to circumvent the constitution to vindictively punish applicant because of his exercise of rights. The preponderance of the evidence suggests that it is unreasonable to believe that all these multiple errors were simple mistakes on the part of the judge and that he did not understand that he was vindictively attempting to punish applicant for his legal activities.

Since the behavior of the judge towards applicant and the harsher punishment and double jeopardy violations took place only "after" applicant exercised his legal rights, it must be presumed that the sentence was the result of an improper prejudice or vindictive and corrupt motive. Based upon this argument, applicant believes that he and not the State, should have been granted summary judgment in his favor under these non-disputed facts.

II. APPLICANT WAS DENIED DUE PROCESS OF LAW UNDER BOTH HIS FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY RIGHTS WHERE THE STATE DID NOT OBTAIN A LAWFUL TRUE BILL INDICTMENT.

Again, it is unclear what the court relied upon for its decision that the State should be granted summary judgment in their favor. It appears the court either believed applicant was attempting to make a subject matter jurisdiction argument that had been rendered frivolous by Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005), or, that applicant had waived the issue by failing to object to the indictments sufficiency prior to the entry of the jury's verdict. Applicant would like to address both because he believes neither apply to this case.

First, applicant had abandoned any subject matter jurisdiction arguments and was proceeding only with a due process and equal protection claim that is governed by both State law and the Federal Constitution. Applicant makes this point because he wants to be clear that he is attempting to give the State the first opportunity to correct both his State and Federal causes of action. Picard v. Connor, 404 U.S. 270 (1971).

If this court is of the opinion that this issue was not sufficiently raised, applicant hereby requests leave of court to amend his application to conform to the evidence on file with the Clerk of Court. See: S.C. Code, § 17-27-70(b); Rule 15 (b), S.C.R.Civ.P. and Applicants' Supplemental Affidavit in Support of Summary Judgment, dated February 4, 2016. Applicant believes this argument was sufficiently set forth in prior arguments where applicant claimed the grand jury procedures violated his Fourteenth Amendment rights to equal protection and due process of law and applicants' State Statutory and Constitutional rights. (See: APPLICANTS MOTION FOR SUMMARY JUDGMENT, ISSUE XII, Page 66; Raising claim as 14th Amend. Due Process/Equal Protection/State Statutory/Const. Right and Subject Matter Jurisdiction claim).

"Although there is no Federal Constitutional Right that States institute prosecutions by means of an indictment returned by a grand jury, States that do employ grand juries must comply with the commands of the Fourteenth Amendment Equal Protection Clause in the operation of those juries". Rose v. Mitchell, 443 U.S. 545, 5557 (1979); Curtis v. Warden of Green Haven, 463 F.2d 84 (1972); Duncan v. Louisiana, 391 U.S. 145 (1968) (State which has grand jury procedure must administer that system consonantly with the Federal Constitution). Because some defendants are indicted by a lawfully constituted grand jury and applicant was not, is prima facie evidence that applicants' rights to equal treatment and protection were violated.

Both the South Carolina Code of Laws under §§ 14-9-210 and 17-19-10 and the South Carolina Constitution under Articles I § 11 and V, § 22, create a Constitutional and Statutory right to have an indictment issued by a legally constituted grand jury. In order to achieve this, grand juries must convene during a term of General Sessions Court and be presided over by a General Sessions Court Judge. S.C. Code, § 14-9-210. The indictments in this case allege that they were true billed "at the Court of General Sessions on May 27, 2008". (APPENDIX TO SUMMARY JUDGMENT MOTION, pages 389-395). The courts records however, indicate that there was no term of General Sessions Court on May 27, 2008. (APPENDIX, pages 542-545).

Likewise, if there were no term of General Sessions Court on May 27, 2008, there could not have been a General Sessions Court Judge presiding over the alleged grand jury proceedings. See: State v. Best, 186 S.E.2d 272 (1972) ("Under our judicial system the presiding judge in the circuit court loses

jurisdiction with the adjournment of the team"); State v. Rinheart, 430 S.E.2d 536 (1993)(same).

It appears that several weeks later on June 9, 2008, the actions of the grand jury were signed off by the then presiding judge in an attempt to suggest that the grand jury had convened "during a term of General Sessions Court and under a presiding General Sessions Court Judge". (APPENDIX, page 548). The records further indicate that the reason for this was that there was a scheduling conflict. The scheduling conflict was that the State was attempting to convene a grand jury proceeding during a time when there was no term of General Sessions Court and thus no General Sessions Judge to preside over their actions.

This is the type of flaw the court in Evans, supra, noted would render the grand jury an illegal body and the indictment void on its face and therefore a nullity. Id. at 518. The court held that "one who demands and is refused the right to be tried for a crime charged against him only upon an indictment presented by a legal grand jury,... may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law". Evans, supra, at 518 (quoting State v. Rector, 158 S.C. 212, 230, 155 S.E. 385, 392 (1930). See also: State v. Williams, 263 S.C. 290, 210 S.E.2d 298, 301 (1974)(State criminal defendant has a State Constitutional Right to have the indictment issued by a "legally constituted grand jury"); State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999)(same); United States v. Macklin, 523 F.2d 193, 195 (1975)(finding grand juries true bill indictment after their term had expired rendered their actions void); United States v. Fein, 504 F.2d 1170 (1974).

The State argued during the hearing that the Chief Justice of the South Carolina Supreme Court issued an administrative order in 2009 in which she authorized grand jury proceedings outside a term of General Sessions Court under certain conditions. First, this order took effect in 2009, long after applicants 2008 indictments and cannot fairly be applied to previous acts. Secondly, the Solicitor did not comply with the order because the State did not file an order of intent to convene a grand jury outside a term or General Sessions Court with the South Carolina Court Administration. Finally, it is unlikely that Chief Justice Toal, or any other Justice, has the authority to issue such an order.

Article V, § 4 of our constitution does authorize the Supreme Court to make rules governing the administration of courts, subject to the Statutory law. In this State we do have "Statutory law" created by Legislature which dictates the method for obtaining a lawful true bill indictment. See:

S.C. Code, § 14-9-210. No orders governing the administration of courts can take precedent over Statutory law, which is always controlling. See: S.C. Constitution, Art. §§ 1, 4 and State v. Cottingham, 224 S.C. 181, 77 S.E.2d 897 (1953)(Statutes override rules of court if in conflict); State v. Duncan, 264 S.E.2d 421 (1980).

The Chief Justices' order has the effect of overriding Legislatures intent and laws. This amounts to a Legislative amendment by the wrong entity. Moreover, when coupled with false and misleading information on the face of the indictments, it amounts to trickery to cause a defendant to waive his State Constitutional rights to be indicted by a legal grand jury, without his knowledge or understanding and without a showing on the record that a waiver was knowingly and intelligently given. State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988)(waiver of constitutional rights requires a showing on the record that waiver was made by defendant knowingly and intelligently).

When a Statutes terms are clear and unambiguous on their face, there is no room for statutory construction and the court must apply the Statute according to its literal meaning. Carolina Power and Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the Statutes operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1998). Moreover, Statutes must be construed strictly against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

In connection, although the court as a whole has authority to make certain kinds of rules, such as rules of procedure not affected by a prior Statutory law, all court members as well as the public generally participate in that process. It is just as questionable, even when a prior Statutory law is not in conflict, whether a single member of the court may issue a broad-sweeping rule without any prior notice or participation by the public.

Thus, applicant has a Federal due process and equal protection right as well as a State Statutory and State Constitutional Right to a lawfully created grand jury, regardless of whether or not it would deprive the court of subject matter jurisdiction.

Next, to the extent the court believes applicant waived this issue by failing to object to the

indictment prior to the entry of the verdict by the jury, Evans, supra, at 518, applicant believes that an excuse exists under Federal law to overcome any alleged procedural default.

First, as noted above, any waiver requires a showing on the record that the waiver was made knowingly and intelligently. Arthurs, supra. There is no indication in the record that Applicant was made aware of the factual and legal basis for this issue nor given the opportunity to object or waive the issue. If the Supreme Court is going to allow courts to obtain indictments outside the scope of the State Constitution, Statutory law and General Sessions Court, all in violation of a defendants due process rights, Evans, supra, then any court prosecuting a defendant without such a valid indictment must place the defendant on notice, on the record, to allow him the opportunity to object. This is particularly true, if the face of the indictment contains false and misleading information that would otherwise falsely suggest that he was indicted by a lawfully constituted grand jury.

There is no indication in the record that applicant was made aware of the factual and legal basis for this issue nor given the opportunity to waive the issue knowingly and intelligently. Attorneys all have legal training and are believed to have a similar understanding of legal defenses. When an attorney fails to object to a legal issue, it is generally viewed as a waiver. The same should not be said of someone representing themselves who lacks training regarding those legal defenses, particularly one who was held in a jail cell until trial without access to any legal research resources, including a stand-by counsel with which to have discovered the violation of his Statutory and Federal rights.

It seems to be missed that prosecutor David Wagner committed Fraud by publishing false and misleading information in the indictment that was designed to keep hidden from applicant, the States' unlawfully obtained indictment. This act, signed by both the prosecutor and grand jury foreperson, constitutes perjury under S.C. Code, § 16-9-10 and conspiracy under S.C. Code, § 16-17-410. Perjury is the giving of false or misleading information in any document "required by the law of the State". S.C. Code, § 16-9-10 A(2). A person is guilty if he commits perjury "by his own act, consent or agreement". § 16-17-410 C. An indictment is a document required by the law in this State. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); S.C. Const. Art. I, § 11 and Art. V, § 22 and S.C. Code, § 17-19-10. Moreover, by signing off on the indictments, prosecutor Wagner; by his own act, consent or "agreement", confirmed

the false information.

Secondly, conspiracy under § 16-9-10 is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object, or "a lawful object by unlawful means". Here, the prosecutor and grand jury foreperson were attempting to obtain a true bill indictment - a lawful act - by unlawful means - convening a grand jury outside a term of General Sessions Court and without a presiding General Sessions Court Judge.

Applicant only recently discovered this violation because he relied upon the regularity of grand jury proceedings and that they are presumed correct absent clear evidence to the contrary. State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (1991). The type tampering with the administration of justice in the manner undisputedly shown here, involves a wrong not only against applicant, but also against the institution set up to protect and safeguard the public institution in which FRAUD cannot complacently be tolerated consistently with the goods order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants - particularly one who is held in a jail cell during his entire pretrial detention without access to any legal research resources or stand-by counsel to assist him.

The Fraud and misinformation contained in the courts own documents was designed to keep hidden from applicant that the indictments were obtained unlawfully. This false and misinformation constitutes a cause and excuse for any procedural default because this interference by officers of the court, caused the claim to be reasonably unknown. Murray v. Carrier, 106 S.Ct. 2639, 2645 (1986) (a showing that the factual or legal basis for a claim was not reasonably available to the defense, or that some interference by officials made compliance impracticable, would constitute cause under this standard); Amadeo v. Zant, 486 U.S. 214, 224-27 (1988) (excuse for default exists if interference by officials caused claim to be reasonably unknown. This lack of knowledge is shown because defense made no intentional decision to forego the claim); Strickler v. Greene, 527 U.S. 263 (1999) (if State officer led defendant to believe that a violation had not occurred cause is shown for why defendant did not object to the violation at trial); Linehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211 (2011).

If a procedural rule requires the defense to object to the error before the error was apparent, or

if the rule was applied in the case in a way that could not have been anticipated, there is no procedural default. United States ex. rel. Duncan v. O'Leary, 806 F.2d 1307, 1314 (1986)(Petitioner's default of not raising claim under State law was invalid because claim was such that Petitioner could not have known about the claim and could not have been said to have waived it).

What sets this case apart from Evans, is that Evans did not consider whether a defendant could waive a "Federal" or "State Constitutional Right" without an on the record demonstration that the waiver had been knowingly and intelligently relinquished; and Evans did not address an issue where the charging instrument contained false and misleading information that would interfere with a defendants ability to recognize that his rights were being violated. Under the unique facts of this case, applicant does not believe that he has knowingly and intelligently waived his due process, equal protection, State Constitutional and Statutory rights and does not believe that such a waiver can be presumed from a silent record.

Based on the foregoing arguments, applicant believes that this court erred in granting the State partial summary judgment and that under the governing case law, it was applicant that was entitled to summary judgment in his favor under the non-disputed facts.

Respectfully submitted,

February 12, 2016

James Douglas Tinsley
James Tinsley, # 171943
Trenton C.I. 3-C-11
84 Greenhouse Road
Trenton, S.C. 29847

CERTIFICATE OF SERVICE

I, James Douglas Tinsley, Sr., hereby certify that I did cause the foregoing to be served upon counsel of record this 22nd day of February, 2016, by placing a true and correct copy in the U.S. Mail with proper postage affixed thereto, and addressed as follows:

Patrick Schmeckpeper
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211

James Douglas Tinsley, Sr.
James Douglas Tinsley, Sr.

FILED
DECEMBER 15, 2015
CLERK OF COURT
2016 MAR -7 A 11:05

ENTERED
COMPUTER

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)
James Tinsley,)
S.C.D.C. No. 171943,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2013-CP-37-0272

MEMORANDUM OF LAW

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2016 APR -4 A 9:01

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections pursuant to orders from the Oconee County Clerk of Court. Tinsley was indicted by the Oconee Grand Jury for Receiving, Possessing, Concealing, Selling, or Disposing of a Stolen Vehicle over \$5,000 pursuant to S.C. Code §16-21-80(30) (2008-GS39-881), and four counts of Receiving Stolen Goods over \$5,000 (2008-GS-39-882 through 885). Tinsley was tried before a jury, representing himself *pro se*, and found guilty as charged. After consolidating indictments 882 through 884, Judge Nicholson sentenced Tinsley to ten years imprisonment suspended on service of seven years and five years probation for both the consolidated indictment and the stolen vehicle indictment. Judge Nicholson sentenced Tinsley to five years imprisonment suspended to five years probation on the remaining indictment. Judge Nicholson made restitution to various victims a condition of probation.

A timely notice of appeal was filed and perfected by Tristan Shaffer, Esq., of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. James Douglas Tinsley, (2012-UP-321, filed

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May 30 2012). A pro se petition for writ of certiorari was filed at the South Carolina Supreme Court on October 2, 2012. While the writ was pending, Applicant filed his first and premature PCR Application (C.A. No. 2013-CP-37-0272) on April 4, 2013.¹ The South Carolina Supreme Court denied cert on February 6, 2014. The Remittitur was issued on February 18, 2014.

Applicant filed an application for post-conviction relief on April 4, 2013. Respondent filed its Return on or about July 23, 2013. An evidentiary hearing was convened into the matter on February 10, 2016. Applicant was present proceeded *pro se*.² Respondent was represented by Patrick Schneckpeper, Esquire, of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Applicant's plea counsel also testified.

Following testimony, the Court directed parties to submit written memoranda summarizing arguments presented at the evidentiary hearing.

APPLICANT'S BURDEN

In a PCR action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)).

DISCUSSION

Ineffective Assistance of Appellate Counsel

Applicant's first allegation is one of ineffective assistance of appellate counsel. A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1)

¹ The State filed a responsive pleadings and requested the Application be dismissed without prejudice. A conditional order was issued on the matter. Because the case is still pending at the present time where Applicant is statutorily entitled to file a PCR action, the State has filed a separate motion requesting the two applications be merged.

² Applicant's appointed counsel, Hugh Welborn, Esquire, was relieved.

deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id., citing Evitts, 469 U.S. 387, 105 S.Ct. 830 (1999). Appellate counsel is not required to raise every nonfrivolous issue that is presented by the record,³ but instead has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).

"For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308 (1983)); see also Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985) (Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. Applicant has failed to meet his burden with respect to each of his allegations.

- a. Failure to argue the trial judge erred in refusing to charge the jury on the distinction between larceny and receiving stolen goods, where if the jury found Applicant was the thief who stole the goods, the jury must find him not guilty of the indicted offense.

³ Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

Respondent submits appellate counsel was not ineffective for failing to raise this issue. First, it was not adequately preserved for appeal. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. State v. Nichols, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997). Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review. State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991). Moreover, the Supreme Court has held that a jury charge must be requested or objected to on the record in order to remain preserved for appeal, *even if* a proposed charge was submitted to the trial court in writing. See Whipple v. State, 324 S.C. 43, 476 S.E.2d 683 (1996).⁴

Applicant did not, at any point on the record, ask the trial judge to make the requested charge. Accordingly, Respondent submits counsel could have reasonably decided that focusing in on an issue that was not properly preserved was not the best route to getting Applicant's conviction overturned. Respondent submits that Applicant has therefore failed to meet his burden to overcome the "strong presumption that counsel rendered effective assistance" with respect to this allegation. It should therefore be denied and dismissed.

- b. Failure to argue the trial judge erred in refusing to charge the jury with "mere presence" and "abandonment."

The trial judge further explained his reasoning for declining to charge abandonment was that there was no testimony that would indicate any abandonment. Trial Tr., p. 335. Respondent submits the trial judge's ruling was correct, and that there was no basis for appealing this issue.

With respect to a jury charge on "mere presence," Applicant abandoned that issue at trial. While the trial court initially seemed resistant to charging the jury on mere presence, it eventually conceded that it may have "misunderstood the issue." Trial Tr., p. 338. Rather than

⁴ See also State v. Johnson, 333 S.C. 62, 64, n.1, 508 S.E.2d 29, 30, n.1 (1998) (clarifying the issue preservation requirements addressed in Whipple, *supra*).

continue to press his argument, however, Applicant withdrew his request to have mere presence charged:

“If it’s complicated, would it be all right that I be allowed to argue constructive possession and mere presence to the jury **and just your other charge cover the rest of it?**”

Trial Tr., p. 338. The trial judge acquiesced, and the issue was resolved. Applicant received what he asked for. C.f., State v. Wilson, 389 S.C. 579, 583-84, 698 S.E.2d 862, 864 (Ct. App. 2010) (finding where party receives favorable ruling in form of curative instruction, no appealable issue absent contemporaneous objection that curative instruction was inadequate; “[o]n the other hand, when an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error”); see also State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)(A party may not complain of an error which his own conduct has induced). Applicant ultimately argued mere presence to the jury during his closing arguments. Trial Tr., p. 347.

- c. Trial judge erred in failing to grant a continuance or otherwise provide funds for an expert handwriting analysis to dispute the State’s surprise evidence.

Respondent submits this issue is not a “significant and obvious issue[] on appeal.” See Gray v. Greer, supra. 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 [the defendant]. State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957). Reversals of a refusal of continuance are about as rare as the proverbial hens’ teeth. Id. There is no indication in the record that the trial court abused its discretion in refusing to grant a continuance, particularly where the Applicant’s grounds were the pendency of several motions – most of which had been raised right before trial. Trial Tr., p. 11-12.

Nor is there any evidence that the trial court erred in finding Applicant's request for funding for an expert was untimely. The record reflects that Applicant did not file his request until a mere *ten days* before his trial. Trial Tr. p. 22.

- d. Trial judge erred in failing to merge all of the indictments into a single offense which violated S.C. Code § 16-13-180, and the multiple convictions and consecutive sentences constitute a double jeopardy violation;

Respondent submits there was no error as the indictments alleged sufficient facts to preclude consolidation, and there was evidence presented at trial indicating that Applicant actually received the stolen goods on different days. The relevant statute provides that "the receipt of multiple items in a single transaction or event constitutes a single offense." § 16-13-180(D). Indictments -882, -883, and -884 alleged that on January 22, Applicant received a number of stolen items. Based on those allegations and Applicant's motion, the trial judge merged -882, -883, and -884 into one charge. Trial Tr., p. 332. The trial judge did not merge the remaining two indictments, because they were alleged to have occurred on different days.

Evidence presented at trial supports the multiple indictments. Applicant was observed with a stolen six wheeler on January 30th or "towards the end of January." Trial Tr. p. 140. Stolen four wheelers were seen in Applicant's possession roughly two weeks earlier. *Id.* The four wheelers were reported stolen on January 15th. Trial Tr. p. 111. One witness, who rented several storage units to Applicant, testified that he saw Applicant photographing "brand-new-looking ATV's" in the storage units on one occasion. Trial Tr., p. 118. He said that a number of trailers came in "at a later time." Trial Tr., p. 119. Darrell Slusser, an RV dealer, testified that he had an RV camper turn up missing December 11. Trial Tr., p. 144. He testified that the camper Applicant had been using was the camper that had been stolen from his lot. Trial Tr., p. 146-47.

Because the State alleged facts sufficient to justify multiple indictments – and there were facts presented at trial from which a jury could reasonably find Applicant received the stolen items at different times and as part of different events – Respondent submits the trial court appropriately denied in part Applicant’s motion to consolidate. Accordingly, Applicant has failed to meet his burden to prove appellate counsel was deficient in failing to brief this issue.

- e. Trial judge erred in refusing to conduct an in camera suppression hearing or in failing to allow Applicant an opportunity to present his own evidence in support of his motion.

Applicant has also failed to meet his burden with respect to this allegation. The trial judge heard testimony from law enforcement,⁵ and found suppression was not necessary at the conclusion of Officer Smith’s testimony. In any event, Respondent submits Applicant has failed to make even a threshold demonstration of a legitimate expectation of privacy in connection with the purportedly searched premises – it seems unlikely that Applicant would have been able to prevail on a claim that he had a legitimate privacy interest in an outdoor area owned by a third party. See, e.g., State v. Herring, 387 S.C. 201, 209, n. 4, 692 S.E.2d 490, 494, n. 4 (2009) (What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection); State v. Crane, 296 S.C. 336, 341, 372 S.E.2d 587, 589 (“No property law concept nor societal ‘understanding’ . . . accords any appellant any expectation of privacy in another individual’s woods”). This allegation should therefore be denied and dismissed.

⁵ Officer David Smith testified in detail as to what led him to obtain search warrants of Applicant’s camper. After obtaining a valid warrant to search Applicant’s rented storage unit at another location, Trial Tr., p. 188, law enforcement recovered a number of stolen four wheelers and a stolen trailer, but were still searching for more stolen items. Trial Tr., p. 188-89. Police were then able to intercept Applicant in his vehicle en route to his campsite. Trial Tr., p. 190-91. One of the passengers in Applicant’s vehicle, Mr. Boles, informed police that there were trailers and ATVs in Applicant’s campsite. Id. Mr. Boles led police to the campsite, where they saw several trailers and ATVs. Trial Tr. p. 192. Law enforcement ran the tags, found they were stolen, and subsequently obtained a search warrant. Trial Tr. p. 192-93.

PROCEEDING PRO SE*Ineffective assistance of appellate counsel*

Applicant claims that his rights were violated when he was not given standby counsel or access to legal resources leading up to his trial.

Applicant first claims appellate counsel was ineffective for failing to argue his waiver of counsel was rendered involuntary because he did not receive the assistance of standby counsel in the time period leading up to trial. Applicant conceded at the evidentiary hearing that he had the assistance of standby counsel during his actual trial. PCR Tr. p. 76.

The Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding *pro se*. United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998). The Fourth Circuit has also noted that lower courts have "broad discretion" to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense. Id. There is no Sixth Amendment right to hybrid representation. State v. Stucky, 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998). Moreover, "[a] defendant does not have a constitutional right to choreograph special appearances by counsel." Id.

Applicant's rights were not violated. He made a valid waiver of his right to counsel, as discussed below, and was not entitled to hybrid representation. Further, even *at trial*, Applicant's representations to the judge indicate he was aware that he was not entitled to counsel. He stated:

"I understand I might not have a right to represent myself and have an attorney, but I believe it's **within the court's discretion** to give me someone who can assist me, getting some of this stuff done."

Trial Tr., p. 10 (emphasis added). Nor did Applicant, at any point, reassert his right to counsel after being denied standby counsel prior to the trial. C.f. State v. Reed, 332 S.C. 35, 44, 503 S.E.2d 747, 751 (“While the right to counsel once waived is no longer absolute, there is a strong presumption that a defendant’s post-trial request for the assistance of counsel should not be refused”). In light of the record, including Applicant’s representations at trial, Respondent requests this allegation be denied and dismissed.

Valid Waiver

Respondent further submits Applicant’s waiver was voluntary in light of his background, knowledge of the legal system, performance at trial, and testimony at the evidentiary hearing. It is well-established that a defendant may waive the right to counsel and proceed *pro se*. Dearybury v. State, 367 S.C. 34, 39, 625 S.E.2d 212, 215 (2006) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Although a defendant’s decision to proceed *pro se* may be to the defendant’s own detriment, it “must be honored out of that respect for the individual which is the lifeblood of the law.” Id. In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se*, with “eyes open,” then the petitioner did not make a knowing and voluntary waiver of counsel and the case should be remanded for a new trial. Watts v. State, 347 S.C. 399, 402-03, 556 S.E.2d 368, 370 (2001).

Absent a specific inquiry by the trial court into the hazards of proceeding *pro se*, reviewing courts must look into the record to determine whether a defendant had sufficient background or was apprised of his rights by some other source. Gardner v. State, 351 S.C. 407, 412, 570 S.E.2d 184, 185 (2002). When determining if an accused has a sufficient background to understand the dangers of self-representation, the courts consider many factors including: (1) the accused’s age, educational background, and physical and mental health; (2) whether the

accused as previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002).

Applicant was between 37 and 38 years old when at trial. The record reflects that he had a tenth grade education, and had been working as a machinist for most of his life. Trial Tr., p. 210. Applicant testified at trial that he had never been treated for alcohol or drug abuse, and had never been treated for mental illness. Id. Applicant testified that he had been examined by a doctor to determine his mental competence to stand trial roughly "15, 16, 17 years ago," and was found competent. Trial Tr., p. 211. Applicant explained at the evidentiary hearing, he clearly has *some* experience in legal matters. Applicant stated that he had been studying the law for roughly twenty (20) years, and had "handled a lot of [his] own cases, civil suits, and things like that." PCR Tr. p. 7. Applicant further testified that he had been conducting legal research in this case. Trial Tr., p. 212. He said that he had been getting his father to "get stuff from the law library and mail to in to [him] at the jail." Id. Applicant testified that he got a previous criminal conviction overturned on post-conviction relief without the assistance of an attorney. Id. Applicant even acknowledged that the fact that Judge Maddox did not give him the specific

warnings of the dangers of representing himself on the record was "not necessarily that big of a deal in this case." PCR Tr. p. 49. He repeatedly emphasized his knowledge and confidence with respect to legal matters: "I think we made it kind of clear that I know a little bit about the law, and so you can go based on my prior knowledge also as to whether or not I would understand what I was waiving." PCR Tr. p. 54. Applicant also conceded at the evidentiary hearing that he was fully aware of the dangers of self-representation at the time of his trial, other than he believed he would receive standby-counsel to assist in research and representation prior to trial. PCR Tr. p. 75. Applicant also appeared to be familiar with the nature of the charges he was being accused of, their potential penalties, as well as a number of possible defenses to them, as evidenced by his use of them at trial. The record reflects that Applicant was represented by counsel before the trial, and that he received the benefit of standby counsel at trial. It does not appear from the record that Applicant was trying to delay or manipulate the proceedings, but rather attempted to represent himself to the best of his abilities. He has continued to represent himself *pro se* in his post-conviction relief proceedings. Applicant apparently knew he was required to comply with the rules of procedure at trial, as evidenced by the fact that he made motions and objections throughout the course of the proceedings. Similarly, Applicant raised a number of legal challenges during the course of his trial. Applicant moved to suppress evidence pursuant to the Fourth Amendment prohibition on unreasonable searches and seizures. Trial Tr., p. 81. Applicant moved for a directed verdict at the conclusion of his trial, arguing that "one who commits a larceny cannot be found guilty of criminally receiving or possession the property that was stolen." Trial Tr., p. 257-58. There is no evidence that Applicant's waiver resulted from coercion or mistreatment, but rather from his honest belief that he could do a better job representing himself than his appointed attorney.

Respondent submits these factors show that Applicant had a sophisticated knowledge of the workings of the legal system at the time of his trial, and was fully aware of the dangers of proceeding *pro se*. In light of those dangers, Applicant made the calculated decision that he could represent himself more effectively than his appointed attorney. This allegation should therefore be denied and dismissed.

Brady Violation

Applicant's allegation appears to be that the State failed to disclose information regarding his co-defendant's plea negotiations, constituting a Brady violation. A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). This rule applies to impeachment evidence as well as exculpatory evidence. Id. Respondent submits Applicant's allegation of a Brady violation is clearly deficient.

Applicant has failed to show that the evidence that was purportedly suppressed was material to guilt or punishment. Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Sheppard v. State, 357 S.C. 646, 660, 594 S.E.2d 462, 471 (2004). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. In the present case, the evidence in question was clearly not material because it was before the jury and Applicant was still convicted. Applicant asked his co-defendant, Mr. Hogan Hugh Justice, whether as a part of his guilty plea he was required to testify against him. Trial Tr. p. 234. Mr. Justice testified that he "was required to tell the truth." Id. Mr. Justice explained his understanding of his plea – he said there was not a *quid pro quo* arrangement concerning

probation. Trial Tr., p. 248. Instead, he said that he was told to be honest, and that his testimony would be taken into consideration at sentencing. Id. Moreover, the solicitor stated during closing arguments that “[t]he deal was to tell the truth,” and that the “State ha[d] a recommendation of a probation sentence,” and “to pay back the victims.” Trial Tr., p. 353.

Even after hearing this testimony and weighing its impeachment value against Mr. Justice, the jury convicted Applicant. Accordingly, even assuming the solicitor’s office failed to comply with the requirements of Brady, Applicant has failed to show a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

This allegation should therefore be denied and dismissed.

After-Discovered Evidence

Applicant appears to be alleging that has discovered evidence since his conviction that entitles him to a new trial. In order to warrant the granting of a new trial on the ground of after-discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; and (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

In the present case, Applicant has failed to show that the purported new evidence “is such as will probably change the result if a new trial is granted.” Clark, supra. Respondent first notes that the bills of sale introduced at trial were admitted into evidence **without objection**, and authenticated by Officer David Smith. Trial Tr., p. 197-98. Applicant has not raised any question about Officer Smith’s credibility. In any event, the long period of time between trial

and the purported deposition⁶ may very well have impacted his memory. Even Applicant conceded that the deposition took place roughly four years after the actual search of the camper. PCR Tr. p. 83.

Officer Arnold testified that he took pictures inside the camper and located several bills of sale in the cabinets of the camper. Trial Tr., p. 220-21.

Even without the bills of sale, there was substantial evidence in the record to indicate Applicant knew the items were stolen. First, Applicant's co-defendant – Mr. Justice – testified that Applicant was aware the items were stolen. Trial Tr., p. 227. He testified that both he *and Applicant* came up with the idea to deal in stolen property jointly, and that Applicant “took the lead” in terms of selling the items on eBay. *Id.* He said that he and Applicant would remove the VIN numbers from equipment, and then replace them with laminated numbers generated on Excel. *Id.*

Second, Applicant was selling these items – many of them brand new – at prices substantially below market value. In fact, the deal Applicant was offering was so good that one of his buyers – Wesley Crawford – was immediately put on notice by friends that he ought to check with police to make sure the four wheeler he bought was not stolen. Trial Tr., p. 108. The four wheeler had “roughly about 60 hours on it,” and was “[b]asically brand new.” Trial Tr., p. 113. Mr. Tinsley sold it for five thousand dollars. *Id.* Testimony from James Haddad, the victim and owner of the Polaris dealership that had been robbed, indicated the four wheeler was worth roughly twelve thousand five hundred dollars. PCR Tr. p. 161. When asked, on cross-examination, whether he was aware that “sometimes things sell for less than they’re worth on eBay,” he responded “[n]ot at that price.” Trial Tr., p. 163-64. As a result, Officer Smith's

⁶ The later testimony raised by Applicant is not in evidence, and was not presented as evidence by Applicant during the course of the evidentiary hearing.

testimony at trial – *even if* contradicted in a deposition three years later – is not material to the issue of guilt or innocence. Respondent therefore request that this allegation be denied.

CONCLUSION

WHEREFORE, the Respondent respectfully requests the court deny Applicant's claim of ineffective assistance of counsel for failure to meet the required burden of proof and dismiss the post-conviction relief application.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

PATRICK L. SCHMECKPEPER
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, S.C. 29211

March 31, 2016.

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

JAMES TINSLEY, # 171943,
Applicant,

vs.

STATE OF SOUTH CAROLINA,
Respondent.

) In The Court of Common Pleas

)

)

CASE NO(s): 2013-CP-37-272
2014-CP-37-737

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) APPLICANTS POST-PCR HEARING BRIEF

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2016 APR 13 P 4:43

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

On February 10, 2016, a hearing was held before the Honorable Brooks Pope Goldsmith, into applicants post-conviction relief action. At the conclusion of the hearing, the court informed both sides that it would allow post-hearing briefs to be filed. The State has filed its brief dated March 31, 2016 and received by Applicant on April 5, 2016. Applicants brief follows.

Applicant would like to point out that he has also attached a copy of a proposed order for post-conviction relief and that in order to exercise as much brevity as possible, applicant has set forth his positions, both legal and factual, within the proposed order. Those arguments accurately reflect applicants understanding of the issues, facts and governing law.

In contrast, this brief is limited to pointing out any flaws, both legal and factual, that were raised by the State in their post-PCR hearing brief and does not include a full analysis of the facts and controlling case law.

ISSUES

I. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL FOR FAILING TO RAISE THE FOLLOWING ISSUES:

- (a) Trial Court erred in failing to submit question of whether Applicant was the thief or a receiver of stolen goods to the jury with appropriate instructions.

The gravamen of the States briefed argument is that there could have been no ineffective assistance of counsel on appeal for failing to raise this issue, because counsel cannot be held ineffective for failing to raise an issue that had not been preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002).

Applicant disagrees with the States' assessment of what is necessary to preserve an issue for appellate review. Issues may be preserved by motion of objection. State v. Tessnear, 185 S.E.2d 611

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(1971). No objection is necessary if earlier in proceeding the judge had an opportunity to pass on the issue. State v. Grantt, 272 S.E.2d 169 (1980). If a request is made but denied, it is unnecessary to raise the request at the conclusion of the court's instructions. State v. Johnson, 508 S.E. 2d 29, 31 (1998). A litigant is not required to persist on a point that has been fully ruled upon by the court. State v. Aldret, 489 S.E.2d 635 (1997). All that is required to preserve an issue, is that the judge be given a fair opportunity to consider the issue and that he make an on-the-record denial of the requested charge. Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958); Grantt, supra; and Johnson, supra, at 30-31 FN1 (recognizing that written request for instructions insufficient if judge does not make on-the-record denial of requested charges). The purpose for this, is to ensure that a defendant does not raise one ground at trial and another ground on appeal. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268, 269 (2000).

While a detailed record is favorable, it should not be the focus in considering whether the trial court was truly given the opportunity to address a claim now being raised by a defendant. The record as a whole indicates that the same issue being raised herein, was also raised at trial, considered by the judge and denied on-the-record due to the judges previous findings at the directed verdict stage.

In the case subjudice, Applicant had previously moved for directed verdict of acquittal based on the fact that the State had established that applicant was the "thief" rather than a "receiver" and that the law prevented his conviction if he were involved in the actual caption and asportation of the stolen goods. (Tr. Trans. pg. 257, lines 20 - pg. 258, line 2); See also: e.g. State v. McNeil, 445 S.E.2d 461, 462 (1994).

Although the trial judge found that applicant "was a principal in the theft of the stolen goods", (Tr. Trans. pg. 260, lines 2-6), he denied the motion because he mistakenly believed the law had been changed and therefore, a thief could "still be convicted of possessing goods he stole himself". (Tr. Trans. pg. 264, lines 21-pg. 265, line 4).

This faulty belief lead to the later refusal to give additional jury instructions. Prior to the jury charges, applicant moved the court verbally and in writing, to give additional instructions. (Tr. Trans. 333, lines 4-12; and Appendix to Summary Judgment Motion, page 397). One of the instructions

was intended to inform the jury that a dispute existed as to whether applicant was the "thief" or a "receiver" and that if the jury found that applicant was a principal in the theft of the stolen goods- just as the trial judge had concluded- that they must find the applicant not guilty of the indicted offense. The written request for jury instructions reads in relevant part:

"Guilt/Element: That if the jury believes I committed the theft of the goods, they must find me not guilty of receiving stolen goods and possessing a stolen vehicle. State v. Hamilton, 172 S.C. 453, 174 S.E.2d 396 (1934)."

(App. pg. 397). Based upon the judges previous ruling at the directed verdict stage, he denied the requested charge because the judge believed it was a legal question for the court and that it would constitute a charge on stealing for which applicant had not been indicted. (Tr. Trans. pg. 334, lines 1-9). The judge ruled in the following manner:

Court: "Alright. Mr. Tinsley. As far as mere presence, abandonment, talking about guilt, stolen knowledge character, I'm not going to charge that".

(Tr. Trans. pg. 333, lines 14-16). This result occurred because the judge believed that if the law had been changed and a thief could be convicted of possessing goods he stole himself, it was not necessary to submit that question to the jury because the jury would be authorized to convict applicant even if he were the thief who stole the goods.¹ See: e.g. Grantt, supra, (where a contested issue of law has been argued during course of the trial and ruled upon by the judge, no objection is necessary regarding that portion of it dealing with the same issue in accordance with its previous ruling).

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The judges belief existed because the Statute was amended in 1993 and McNeil dealt with the prior law. However, the distinction between receiving stolen goods and larceny did not change and the courts continue to follow the same standards. The controlling factor is whether the defendant came to possess the goods prior to or after completion of the larceny. If before, he is the thief and may not be convicted as a receiver or possessor of the stolen goods. State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 FN1 (2009); Criminal Law of South Carolina, (4th Ed. 2002), W. McAnich and G. Fairly, at 410 (For a complete list of essential elements for receiving stolen goods, the State must also prove that the goods were stolen by someone else).

While the transcript may not be clear to everyone, applicant and the trial judge fully understood the colloquy, and the record as a whole, sufficiently demonstrates the request being made by applicant. It is apparent the issue was presented to and denied by the judge based upon his previous more detailed reasoning. Since the judge had already ruled that there is no distinctions between whether applicant was a thief or a receiver and that such questions were legal matters for the court; it was unnecessary for applicant to even move to have that question presented to the jury. Strubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000)(defendant is not required to engage in futile actions in order to preserve issues for appeal).

The distinctions between this case and cases such as State v. Whipple, 476 S.E.2d 683 (1996) was pointed out in Johnson, supra, at 30-31 FN1. The defendant in Whipple also submitted a request for charges, but contrary to this case, there was no on-the-record ruling as to whether or not the judge would give charges. Here, applicant moved the court to give additional charges and the court denied the request for charges on-the-record. Accordingly, the issue is preserved for review and applicant was not required to renew his request at the conclusion of the charges.

Assuming arguendo, that this court believes additional objections should have been made to clarify the record, applicant should be excused from such failures because the trial judge specifically ordered applicant not to object to his rulings. (Tr. Trans. pg. 79, lines 2-9); See also: Rule 18, S.C.R.Crim.P. (Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced).

During the PCR hearing, the State argued that because the written request for jury charges were not attached to the trial transcript, that this somehow prevents the appellate court from reviewing the issue. This is a completely different matter. There is a distinction between allowing the trial judge the first opportunity to consider a claim--thereby preserving it for appellate review--and in providing a sufficient record for the appellate court to consider the issues before them. The State seems to be somewhat confused as to the distinction between the "trial transcript" and the "record on appeal". It is true that the appellate court cannot review issues that are not supported by the "record on appeal", but the "record on appeal" can contain additional items such as motions, letters, requests for jury

instructions, and tape recordings of interrogations, etc... that are not found in the actual "trial transcript". See: Ezell v. State, 548 S.E.2d 852 (2001)(the failure to include additional evidence of tape recording in record on appeal constitutes ineffective assistance of counsel on appeal).

Here, applicant provided appellate counsel with the written request for charges, (PCR Trans. pgs. 64, lines 12-20; pg. 66, lines 23-pg. 67, lines 16; and pg. 69, line 21-pg. 70, line 2), at the time he informed counsel of the proper argument to brief. (Supplemental Appendix, pages 575-76). Counsel could have included that written request in the "record on appeal" had he made the effort to brief this issue and he could have amended the brief prior to oral arguments to include this issue. Southerland v. State, 524 S.E.2d 833 FN4 (1999)(ineffective assistance of appellate counsel in failing to amend the brief prior to oral arguments).

Applicant contends that this issue was sufficiently preserved for review and that the record on appeal could easily have been constructed to include sufficient documentation for the appellate court to review the claim.²

Finally, the State maintains in their brief that Appellate Counsel made a reasonable professional decision to exclude this and other issues. This claim is unsupported by any testimony or affidavits from appellate counsel and amounts to pure speculation or conjecture on the part of Respondents counsel. This unsupported conclusion is insufficient to establish that the rejection of this issue was a professional decision. As shown in Applicants proposed PCR order, he would have had his conviction reversed based on prior case law, had the issue been raised on appeal.³

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This issue is likely non-waivable even if a procedural default exists because this question goes to an "element" of the crime which must be charged to the jury whether requested to do so or not. State v. Lyles, 41 S.E.2d 625 (1947); State v. McGee, 193 S.E. 303 (1937)(the failure to preserve "basic" or "fundamental" flaws in charges does not constitute a waiver because the trial judge was already required to charge the jury on the correct principals of law). Article V, § 21 of the South Carolina Constitution, places the duty of the judge to "declare the law" whether requested to do so or not. State v. White, 44 S.E.2d 741, 743 (1947)(quoting State v. Durant, 70 S.E. 306, 306-07 (1911)).

3

The State suggests that Tristan Shaffer took over the case and any ineffectiveness must be shown against him - not Celia Robinson - the original appellate defense attorney. (PCR Trans. pg. 89, lines 7-10). The letters so heavily relied upon by the State during the PCR hearing, demonstrate that Mr. Shaffer simply adopted Ms. Robinsons issues and would not conduct his own evaluation. This is supported by Mr. Saffers contention that if any legitimate issues were missed, Applicant can seek ineffective assistance of counsel-not against himself for adopting her issues-but against

- (b) Applicant was denied due process of law where there was a material variance between the States' evidence and the allegations in the indictment.

The State did not address this issue in their brief, but did imply during the PCR hearing that this issue was likewise not preserved for appellate review. The State is mistaken however. During the trial, the applicant moved for directed verdict of acquittal and asked the court dismiss the charges due to a variance in the evidence.

"Mr. Justice plead guilty to larceny in this State to the theft of property from another State. In this case a material variance between the charge and proof entitles the defendant to directed verdict".

(Tr. Trans. pages 258, lines 11-14). Later in the trial applicant again made the same point.

"...Right. This case is a 2000 case and it deals with; and it says that a material variance between the charge and the proof entitles the defendant to directed verdict. The proof was that I was a thief, the charge is that I'm in possession. And this case pretty much is on point about that".

(Tr. Trans. page 339, line 15-pg. 340, line 14). The court refused to grant the motion or otherwise quash the charges and this resulted in an improper modification of the charges due to the variance between the charge and facts and arguments offered by the State at trial. Applicants due process rights were violated because he was basically convicted on an unindicted offense for stealing the goods himself.

This tactic also prevented him from having true notice of the charges and what he must be prepared to defend against at trial, because he believed he would have to defend himself against a claim that he "received the goods from someone else who stole them", but ended up being surprised when he found himself defending against a claim that he actually "stole the goods himself".

Applicant contends that this issue was properly preserved for review and again the State has offered no affidavits or testimony from appellate counsel that the refusal to raise this issue was the result of a professional decision.

- (c) Trial Judge erred in refusing to merge all of the indictments into a single offense.

Ms. Robinson. (PCR Trans. pg. 66, lines 11-13; Appendix to Summary Judgment pgs. 571-72). Thus, Ms. Robinson was ineffective in failing to raise this issue and Mr. Shaffer was ineffective in failing to conduct his own evaluation of the issues and by failing to supplement the issues after being informed by applicant of the strength of these issues and the weakness of the issue raised.

The State suggests that the trial judge did not err in failing to merge all of the indictments into a single offense because the indictments had different dates on them and could not have been the same event. Thus, according to the State, appellate counsel was not ineffective in failing to raise this issue.

First, the dates on the indictments are not evidence. (Trans. pg. 26, lines 7-14). The evidence at trial indicated that all of the property was possessed long before the earliest date on any of the indictments. The earliest date on the indictments is January 13, 2008. All of the items were possessed long before that January 13, 2008 date, except the backhoe that was brought to the campsite on January 29, 2008. Applicant was granted directed verdict as to the backhoe and therefore the date of January 29, 2008 is irrelevant to this argument. During the trial, the State argued that multiple charges had been brought because of an ongoing investigation that lead them to discover the stolen goods several days apart- some at a storage facility and some at the campsite. The State also suggested that multiple victims would justify multiple charges. (Tr. Trans. pages, 77, line 12- page 78; line 24).

The fact that applicant possessed multiple stolen goods at two different locations, does not justify multiple charges. Applicant would have been in constructive possession of both the items at the storage facility and those found at the campsite at the same time. Thus, because all of the items were possessed long before the earliest date on any of the indictments, it was a violation of State law and double jeopardy to refuse to merge the multiple offenses into a single count. Stevens v. State, 617 S.E. 2d 366 (2005)(the possession of multiple stolen goods at one time constitutes a single offense as the number of indictments do not necessarily indicate the number of offenses).

Moreover, the fact that there were multiple victims does not change the result. There were multiple victims in Stevens, supra. When dealing with property crimes, multiple victims does not justify multiple convictions. See: State v. Waller, 312 S.E.2d 552, 553 (1984)(larceny of multiple items constitutes a single offense even if stolen from multiple victims); United States v. Vest, 913 F. Supp. 1345 (1995)(the problem with multiplicitous indictments is that it may suggest to the jury that the defendant committed more than one crime).

Therefore, the States arguments do not affect the outcome of this case under the governing law as set forth in applicants proposed PCR order.

- (d) Trial Judge erred in refusing to charge the jury with "mere presence" and "abandonment".

The State suggests that the trial judge did not err in refusing to charge the jury with "mere presence" and "abandonment". First, the State suggests that there was no evidence in the record to support the charge of abandonment. This is not supported by the record. The trial transcript clearly provides sufficient evidence to support this charge. Applicants own testimony was that he was asked by Justice to help sell some ATV's on eBay that he allegedly had purchased at an IRS seizure auction. Applicant later discovered something suspicious about the ATV's and stopped trying to sell them and abandoned any further involvement with them. (Tr. Trans. pages 285-299).

Next, the State suggests applicant abandoned his argument that the court should instruct the jury on "mere presence". This is not so. Applicant requested the "mere presence" instruction which the court refused. "Alright. Mr. Tinsley. As far as mere presence, abandonment,... I'm not going to charge that". Tr. Trans. pg. 333, lines 14-16. Following this denial, the applicant did ask if it would be alright for the defense to argue mere presence during closing arguments, but that does not correct the flaw in the courts instructions. The weight given to such arguments by the defendant would have seemed weak, and possibly even an attempt at misleading the jury, whereas, instructions by the court would have carried great weight with the jury. The arguments given by the State does not overcome the facts and controlling authority provided by the applicant in his proposed PCR order.

- (e) Applicant was denied due process, equal protection of the law and a fair opportunity to defend himself against the States accusations, when the court failed to provide applicant with funds for an expert following the States surprise evidence.

The basis of the States argument is that Applicant only requested a continuance and funds for an expert a mere ten days prior to trial and thus the trial judge was justified in finding that the motions were not timely. The State seems to miss the point. It was the State who failed to provide the surprise evidence in a timely manner so as to give applicant time to obtain funds and expert witness testimony. Applicant moved the court immediately after receiving notice of the bill of sales

and cannot be held responsible for the States failure to schedule them for a hearing prior to the day of trial. Any timeliness issues must be imputed to the State for had they provided the bill of sales months earlier when they disclosed the initial discovery, this error would not have occurred. The States tactic allowed themselves to fabricate bill of sales and introduce them against applicant at trial without providing him with a fair opportunity to dispute them with expert testimony. For the reasons given in applicants proposed PCR order, applicant contends that he is entitled to relief in his favor.

- (f) Applicant was denied due process and equal protection of the law when the trial judge failed to conduct an in camera suppression hearing thereby denying applicant a full, fair and adequate opportunity to address his Fourth Amendment Claims.

The State suggests applicant was not deprived of due process of law even though he was not given a full and fair opportunity to put up his own evidence in support of his claim, because the judge was justified in denying the suppression motion based upon the testimony of Officer Smith alone.

First, Officer Smiths testimony neglected to tell the court that police had entered the property in question prior to obtaining the warrant; that the property was privately posted against trespassing and that police had to cross a fence and travel 3/4 of a mile down a dirt driveway back in the woods in order to view the stolen items. Smith failed to inform the court that while Mr. Boles informed them of where applicant was staying at the campsite, Mr. Boles was from out-of-state and was not a member of the gold mining camp and was not authorized to enter the property without Applicants presence.

In connection, the State seems to suggest that applicant had no privacy interest in the property because he was not the owner. Applicant was a member of the Lost Dutchman Mining Association who owns the property and only members are authorized on the property. It is posted and fenced to prevent access to the public. Therefore, the area in question was not exposed to the public, because it could not be viewed from a public vantage point. United States v. Bellina, 665 F.2d 1335, 1341-42 (4th Cir. 1981). The arguments offered by the State do not change the outcome of this case under the governing law.

- (g) The Trial Judge erred by failing to provide applicant with resources necessary to prepare for trial in violation of due process and equal protection of the Fourteenth Amendment and in violation of the State Constitution and prior State Supreme Court authority.

The State has skirted this issue and have failed to address the merits of this issue. They simply maintain that applicant has no "Sixth" Amendment Right to an advisory counsel in a pre-trial setting and therefore the trial judge could not have erred or violated applicants due process rights. United States v. Lawrence, 161 F.3d 250 (1998).

First, Applicant did not raise this issue under the "Sixth" Amendment. Applicant contends instead that these acts violated his "Fourteenth" Amendment Equal Protection and Due Process Rights as well as our "State" Constitution and "prior State Supreme Court Case law". The authority relied upon by the State has some negative treatment and did not consider whether a State created "right" might require "stand-by" counsel. States may create or expand rights beyond those created by the Federal Constitution. Wolff v. McDonnell, 418 U.S. 539, 557 (1974)(State created right to good time credits); Furtick v. SCDC, 649 S.E.2d 35, 36-37 (2007)(same).

Secondly, applicant admits that his access to legal research resources could have been provided by some means other than a stand-by counsel and that he has no right to dictate the method used by courts. United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978). What is missed by the State is that this issue has more to do with access to resources to prepare for trial, than any right to stand-by counsel. In other words, even if applicant has no right to stand-by counsel under any State or Federal Constitution, he would still have a right to the resources necessary to prepare for trial-in whatever form it comes. What is important here is that applicant was given absolutely no alternative methods for preparing for trial.

Nevertheless, applicant also believes that he does have a "right" to the assistance of "stand-by" counsel to utilize as "an aid to the extent he so desires", State v. Reed, 503 S.E.2d 747, 751 (1998), as long as he does not attempt to have the "stand-by" counsels status changed into one of "co-counsel" that "represents" him. State v. Sanders, 237 S.E.2d 53, 54 (1977); United States v. Swinney, 970 F.2d 494, 498 (8th Cir. 1992)(a defendant remains free, of course, to elevate stand-by counsel to a lead counsel role, thereby waiving the defendants Faretta rights. The defendant, however, does not have a Constitutional right to hybrid representation. That is, the defendant cannot demand the right to act as co-counsel. Thus, the court may properly require the defendant to choose either to proceed pro se,

with or without the help of stand-by counsel, or to utilize the full assistance of counsel, who would present the defense). Here, applicant was not trying to choreograph a special appearance by counsel or convert counsels status into one of co-counsel or hybrid representation. Applicant did not even want counsel to be seen during the trial at all. Applicant was simply attempting to gain access to some form of legal research aid to conduct research and interview witnesses in preparation for trial. Contrary to the trial court and the States belief, this is not hybrid representation.

In order to exercise his Faretta v. California, 422 U.S. 806 (1975) rights, applicant contends that he must be provided with resources to make his self-representation meaningful and not simply amount to an empty formality. Many courts have held that a defendant must be provided with stand-by counsel to assist him "prior to" trial to help prepare for trial, and "during" trial to answer questions. Milton v. Morris, 767 F.2d 1443, 1446 (1985)(he may be offered the assistance of counsel in a variety of ways - for "pretrial preparations" and "during trial"). Even in a prison context, where inmates rights are routinely restricted, it has been held that the inability to prepare a defense is a due process violation. See: e.g. Benitez v. Wolff, 907 F.2d 1293 (2d Cir. 1993)(inmate facing prison disciplinary charges was "denied due process" when he was moved from his cell and not allowed to take his papers with him, which hampered his right to properly prepare his defense).

Contrary to some judges opinions, Faretta apparently "Constitutionalizes" the right to have "stand-by counsel" to the point that it may be ordered "even over a defendants objection". McKaskle v. Wiggins, 465 U.S. 168, 176 and 184 (1984). "Although not stated in the Amendment in so many words, the right to self-representation - to make one's own defense personally - is thus necessarily implied by the structure of the amendment. The right to defend is given directly to the accused: For it is he who suffers the consequences if the defense fails". Faretta, supra, at 819-20. "The rights to notice, confrontation and compulsory process mean, at a minimum, that time to prepare and some access to materials and witnesses are fundamental to a meaningful right of representation. An incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense...The State may not unreasonably hinder the defendants efforts to prepare his own defense." Milton, supra, at 1446.

The South Carolina Supreme Court apparently recognizes that a due process concern exists and has taken an active roll in prohibiting the type of violations that occurred in this case by finding that our State Constitution creates a "right" to "stand-by" counsel, even when a defendant represents himself. Sanders, supra, at 54.

Contrary to the arguments made by the State and the trial judge, Faretta requires more than the courts acceptance of a defendants wishes to represent himself. It creates a concomitant right for courts to provide incarcerated defendants with the resources to prepare for his defense. Otherwise, the Faretta right is rendered meaningless and amounts to a pro forma acceptance of the defendants right to represent himself with no real means or ability to do so.

It is all about fairness to both sides. If attorneys were prevented from accessing legal authorities to prepare their defenses for clients or their prosecutions of defendants, they would scream foul. They would demand that they need those resources to prepare their cases and ensure they are up-to-date on the current interpretation of the law. They would maintain that they cannot be held responsible for failing to recognize unforeseen changes in the law that occurred after those resources were taken away. See: e.g. Patterson v. State, 597 S.E.2d 150 (2004)(an attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction).

The same applies to a defendant attempting to represent himself. Without all forms of access to legal resources, the defendant cannot learn of possible defenses available to him. He cannot learn of any recent changes in the law or court procedures that may affect his ability to gather information to perfect his defense. It may prevent him from recognizing when officers of the court are attempting to mislead him concerning those laws, rules, procedures or practices as an unfair tactical advantage to cause the pro se to unwillingly waive unknown rights or protections. Mayberry v. Pennsylvania, 400 U.S. 455, 468 (1971)(Burger, J. concurring)(trial "integrity" mandates that the judge take measures to ensure that due process is met). It is axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands". Greenholtz v. Inmates of Nebraska, 442 U.S. 1, 12 (1979)(quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

It is fundamentally unfair for the judicial system and its officers of the court, to create rules,

procedures, laws and legal precedent and require the pro se to comply with them but fail to provide access to those basic resources through some method. While the court may be somewhat persuaded to follow the Fourth Circuit in Lawrence, the words of the court in State v. McDowell, 310 S.E.2d 301, 310 (1984) seem particularly relevant here.

"State courts are no less obligated to protect and no less capable of protecting a defendants' Federal Constitutional rights than are Federal Courts. In performing this obligation a State court should exercise and apply its own independent judgment, treating of course, decisions of the United States Supreme Court as binding and according to decisions of the lower federal courts such persuasiveness as those decisions might reasonably command".

It does not seem reasonable to apply Lawrence, to the facts of this case because it too, apparently failed to understand the distinctions between "stand-by" counsel and "hybrid representation". Even though it claims the "Sixth" Amendment does not create a right to an advisory counsel, it fails to consider whether the Fourteenth Amendment due process and equal protection clauses or whether Faretta or our South Carolina Constitution creates such a right in addition to those rights found in the "Sixth" Amendment. Most importantly, it does not stand for the position that courts are not required to provide the incarcerated pro se defendant with some form of access to legal research resources, or that "stand-by" counsel is not a reasonable method of providing those requirements. See: United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978) (stand-by counsel is a reasonable method of providing a research aid to a pro se defendant. Defendants cannot dictate which methods the courts utilize to provide those services). In light of the record and controlling authority, applicant requests that post-conviction relief be granted on this issue.

II. APPLICANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN HE DID NOT KNOWINGLY, INTELLIGENTLY OR VOLUNTARILY WAIVE COUNSEL.

The State suggests applicant must have knowingly and intelligently waived his right to counsel because he had no right to an advisory counsel, stated several times that he wanted to represent himself and had the education and background to have understood that he had no right to hybrid representation. The question is not even whether applicant had a right to stand-by counsel, or had requested to represent himself, but rather, whether based on prior authority, applicant had a detrimental reliance that if he represented himself, he would be provided with resources to prepare for trial, which lead him

to waive counsel for purposes of conducting the trial.

If applicant believed the "consequences" of representing himself would result in his being provided with "stand-by" counsel or some other form of research aid to assist him in trial preparations; he could not have knowingly and intelligently waived counsel if he was then denied his reasonable expectation.

The courts focus should be on whether there is some authority that could have reasonably lead applicant to believe that he would be provided with stand-by counsel, and whether the court gave applicant any warnings or notices that would have indicated that applicant should not rely upon those authorities. First, there are many authorities, even from our State Supreme Court, that have indicated that a defendant is entitled to the assistance of stand-by counsel, even if he represents himself. State v. Sanders, 237 S.E.2d 53, 54 (1977); State v. Brewer, 492 S.E.2d 97 (1997); State v. Reed, 503 S.E.2d 747, 751 (1998); Milton v. Morris, 767 F.2d 1443, 1446-47 (1985); State v. Cash, 419 S.E.2d 811 (1992)(some factors are relevant regardless of whether waiver of counsel was challenged on direct appeal or in a PCR. Factors include defendants' age, education,...warnings...use of stand-by counsel, and knowledge of potential defenses)(quoting Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065-67 (11th Cir. 1986)).

Secondly, Judge Maddox never gave applicant any warnings and did not explain that he intended to force applicant to stand trial without the use of any stand-by counsel or other legal research aid. A defendants waiver of right to counsel, must be knowingly and intelligently given. United States v. Jennings, 323 F.3d 263 (4th Cir. 2003). The record must show that the defendant "knows what he is doing and his choice is made with his eyes open". Faretta, supra, at 835. In other words, he must understand the consequences of his desire to waive counsel. In this case, applicant would have needed to understand that one of the consequences of his self-representation would be that he would be forced to represent himself without any legal research aid or witness interviewing resource.

The non-disputed facts and evidence in this case indicates that applicant did not knowingly and intelligently waive his right because his decision rested on a belief that was not honored. Applicants understanding of what would happen was that he would be provided with "stand-by" counsel exactly the

way every other pro se defendant had been given in South Carolina previously. To use to the "extent he so desired", Reed, supra, short of having counsel make a special appearance as a co-counsel. The fact that in the eleventh hour the court appointed an attorney who had no knowledge of the case, had not conducted any interviews or research, to "set-by" applicant during the trial, did not correct the flaw. This assistance was too little and came too late to be of any assistance to applicant in preparing for trial. Applicant needed stand-by counsel "prior to" trial to assist in preparing for trial, not "during" trial to answer questions. When this did not occur, applicant continued to request continuances and the appointment of stand-by counsel and those requests should have placed the court on notice that applicants waiver of counsel was not knowingly and intelligently given.

Finally, the State suggests that after not being given stand-by counsel or some other research resource to prepare for trial, applicant should have requested at the start of the trial to retract his desire to represent himself and ask the court to appoint counsel to conduct the trial for him. This is not the law however, and is very troubling. If that were the law it could easily be abused by the courts. Anytime the court desired not to have a defendant represent himself, the court could simply hamper the defendants ability to prepare for trial until the defendant gives in and relinquishes a right he would otherwise like to exercise. Moreover, requesting the court to appoint Mr. Day to represent applicant at trial at such a late date would not have benefited applicant in any way. Mr. Day was instructed to "set-by" applicant only the morning of the trial. Mr. Day had not interviewed any witnesses, conducted any investigation, researched any legal arguments that might apply to the case and knew even far less about the case than applicant. Moreover, such an argument by the State is contrary to the rights to self-representation created by Faretta, supra.

Based on the foregoing and the arguments set forth in applicants proposed PCR order, applicant contends that he clearly did not understand the "consequences" of his self-representation which invalidated the waiver of counsel. Applicants education and prior knowledge of the law suggests that he would have known about and relied upon a belief that he would be given some form of research aid even if he is representing himself. The fact that he was not given any meaningful method of preparing for trial, rendered his waiver invalid.

III. APPLICANT WAS DENIED DUE PROCESS OF LAW BY THE PROSECUTORS MISCONDUCT IN FAILING TO:

- (a) Provide Brady materials to defense concerning a deal made with co-defendant for probation and other benefits in exchange for testimony implicating applicant.

The State suggests that applicant has failed to demonstrate that he was not provided with relevant Brady materials and that no prejudice can be shown because the jury was made aware of the deal to probation.

First, applicant contends that the preponderance of the evidence shows that applicant was not provided with these Brady materials. Both applicants testimony, (PCR Trans. pg. 55, line 15-pg. 58, line 19), and his affidavits(Supplemental affidavit dated February 4, 2016) demonstrate that he was not provided with the details of any deals with Justice for leniency. Secondly, applicant provided both the initial discovery disclosure (Appendix to Summary Judgment, page 478), and the supplemental discovery disclosure (Id. pg. 480), and neither of them mention anything about any deals with Mr. Justice for probation or other benefits in exchange for his testimony.

Moreover, the court can take judicial notice of its own court records and if any such disclosures had been given to applicant, the clerk of courts records would indicate it. Finally, the State did not provide any records showing it had provided applicant with notice of the plea deal with Justice. David Wagner, the assistant solicitor who prosecuted the case, did not testify nor provide his own affidavit that he had provided these Brady materials to applicant and he was present in the courtroom for most of the PCR hearing but mysteriously disappeared when Mr. Justice began to testify. Applicant maintains that he carried his burden of proof and that his claims are undisputed by anything other than conjecture on the part of the States' attorney.

Next, The fact that there was some abstract mention of probation at trial is irrelevant. What is important is that the Judge, Solicitor and Mr. Justice, lied about the deal and how it might motivate Mr. Justice to testify falsely and this mislead the jury concerning Justices' credibility and truthfulness. Applicant does agree that Mr. Justice initially intended to tell the truth about the negotiated plea deal to probation, but later changed his testimony to deny a plea deal following the trial judges' interruption of his testimony and quest to discredit any argument that Justice was motivated by the deal to give false testimony to help himself. The statement given by the judge must have

influenced Justice to lie out of fear that the Judge would retract the promised sentence if Justice did not modify his testimony.

CROSS-EXAMINATION OF HUGH JUSTICE BY MR. TINSLEY

Q. And that negotiated plea is for you to receive probation right?

A. That's right.

Q. And since you --

THE COURT: Let me correct something. Okay. That was not a negotiated plea. That was a recommendation by the State... That was a recommendation by the State. The court can accept it or reject that recommendation. This gentleman has not been sentenced. The court postponed sentencing. It was a recommendation not a negotiated plea. I want the jury to understand that. There's a difference legally between a negotiated plea and recommendation. A recommendation is what the State makes to the court. The court can accept or reject it. A negotiated plea is a contract between the parties when the courts' involved in the negotiations and agrees to that negotiated plea prior to the plea. This was a recommendation. This gentleman has not been sentenced. I postponed sentencing, the court did. So I want to clarify that, Mr. Tinsley, So don't mislead the jury.

(Tr. Trans. page 234, line 18-pg. 235, line 14). Applicant contends this was a lie and that it was the court who was misleading the jury. Later in the crossexamination, Applicant again tries to get Justice to admit that a deal existed.

Q. Based on the advice of your attorney and your understanding, is it your understanding you're supposed to get probation for this testimony?

A. I don't think it's a quid pro quo, if that's what you mean. I'm not sentenced. I don't think -- it's not a foregone conclusion. I was just told to be honest and that would be taken into consideration.

(Tr. Trans. pg. 248, lines 4-10). This was all lies. According to the plea transcript of Mr. Justice, both his attorney (Appendix page 408, lines 14-18) and the court referred to the agreement as a negotiated plea. (Appendix page 409, lines 22-24). The judge accepted the terms of the agreement if Justice would testify against applicant in his trial. (Appendix page 417, line 23- page 418, line 3). At that point there was a binding contract/agreement between the plea judge and Mr. Justice. Both Mr. Justice and the trial judge attempted to circumvent the agreement and duty to tell the truth to the jury concerning the agreement, which may have discredited Justices' testimony, by relying on the argument that no enforceable deal existed because Justice "had not been sentenced" at that time. Whether or not Justice had been sentenced at the time of his testimony in applicants trial is irrelevant. Justice had placed himself in jeopardy by pleading guilty. The judge had accepted the plea and agreed

to follow the terms of the probation agreement in exchange for Justices' testimony. That constituted an enforceable agreement because Justice had performed by pleading guilty and by providing the requested testimony in applicants trial.

Even though the judge was then required to sentence Justice in accordance with that agreement, both the Judge and Solicitor attempted to suggest that Justice may not get probation because the "court can accept or reject it". Likewise, during closing arguments, the solicitor bolstered the false impression of Justices' motivation for testifying, by suggesting that there was just a recommendation to probation - implying that Justice could receive a harsher sentence - and that Justice would have to go on and face other charges in other Counties. (Tr. Trans. page 353, lines 12-16). The prosecutor was implying that Justice was testifying against, rather than in aid of, his own penal interests, which was untrue and misleading. As shown in applicants proposed PCR order, Justices' deal was enforceable because he had already performed and his testimony actually prevented other Counties from prosecuting him under double jeopardy.

Collectively, the statements of the trial judge, solicitor and Justice were intended to mislead the jury concerning the possible motivations for Justice giving such damaging testimony. The truth however, would have directly "impunged the veracity of the States' key witness". Cambell v. Reed, 594 F.2d 4, 8 (4th Cir. 1979); Napue v. Illinois. 360 U.S. 264, 269 (1959) (possible interest of a witness in testifying falsely may affect the jury's estimate of the truthfulness and reliability of a given witness).

Moreover, the States argument that the jury at least heard about a possible deal for probation, was overshadowed and reduced to nothing more than speculation and conjecture on the part of the applicant, due to the courts comments, Justices' testimony and the prosecutors closing arguments which disputed the claim. See: e.g. Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976) (recognizing "no matter how good defense counsel's argument may have been, it was apparent to the jury that it rested upon conjecture, a conjecture which the prosecutor disputed").

The State also implies that the failure to provide Brady materials was harmless because Justice's testimony was not exculpatory and he told the truth. Applicant contends that he did not tell the truth about his deal for leniency and that alone shows a propensity to lie to help himself and thus the

Brady materials would have been impeaching.

Nevertheless, the issue is not whether or not the jury heard of some reference to a possible probationary sentence or whether Justice was telling the truth about applicants possible involvement in the thefts of property. The question is whether the jury was misled about the benefits to Justice for his testimony and that the failure to provide the Brady materials concerning those benefits to Justice, prevented applicant from using them to impeach Justice when he lied, and to object to the trial judge and solicitors false statements to the jury. By denying that a deal to probation existed in exchange for his testimony implicating applicant, Justice committed perjury right in front of the jury. Had they known that they may not have found Justice credible when he claimed applicant was involved in the crimes. The failure to provide this information for impeachment purposes prevented the jury from witnessing Justices' willingness to commit perjury to save himself.⁴

Justice was asked more than once if he had a plea deal to probation in exchange for his testimony. The Judge, Solicitor and Justices' denials thwarted applicants attempt to demonstrate that Justice may be motivated to testify falsely in order to help himself. This resulted in putting applicant in the unenviable position of having to raise the point without any support in the record. Though applicant urged the jury to infer the existence of a deal from the circumstances, without any direct evidence of an agreement, and contrary to the judges comments, Justices' testimony and the solicitors bolstering closing statement, applicants claims naturally seemed weak.

- (b) Correct false testimony when it occurred and prosecutors' false statements during closing arguments that created a false impression of the reasons for Justices' testimony.

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During the PCR hearing, Judge Goldsmith asked Justice if he told the truth at trial. (PCR Trans. pg. 101, lines 4-10). Justice claimed that he did. Applicant maintains that is a lie. Obviously, Mr. Justice is not going to admit that he committed perjury, but careful consideration of his testimony demonstrates that his concern was not in telling the truth, but in preventing other jurisdictions from prosecuting him. "...I was concerned that if I plead to something that did not happen, that I had no protection against somebody else coming after me..." (PCR Trans. pg. 99, lines 6-8). In other words, what Justice claimed at trial did not happen, but Justice was able to manipulate the prosecution into letting him implicate applicant and plead to something that did not happen so as to prevent other jurisdictions from coming after him. This seems to be supported by the States claims that Justices' trial testimony about applicant participating in thefts was a lie. (Tr. Trans. pg. 261, lns. 12-15; pg. 262, lns 4-6 and pg. 263, lns 10-11).

This issue does not seem to have been addressed by the State in their brief. Nevertheless, as pointed out in applicants proposed PCR order, he contends that he was denied due process of law when the Solicitor failed to correct the false impressions created by the judges' statements and Justices' testimony and by making misleading statements himself during closing arguments.

The Solicitor should have known that under the controlling law, a binding contract/agreement had been created between the court and Justice and since Justice had already performed, the court was bound by the probationary terms of the agreement and could not breach that agreement legally. When the court and Justice implied that no benefits were being given to Justice in exchange for his testimony, the Solicitor should have corrected the false impression.

Moreover, the Solicitor should not have made additional misleading comments during closing that lead the jury to believe Justice was testifying against, rather than in aid of, his own penal interests. Justices' testimony actually helped him, not place him in further jeopardy, but this fact was kept hidden from the jury. The State implied previously, that this information was before the jury and applicant was nevertheless found guilty. Applicant maintains that the truth concerning Justices possible motivations for testifying falsely was never before the jury. The jury was lied to about the importance of the information. Riddle v. Ozmint, 631 S.E.2d 70, 75 (2006); United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980) (leniency premised on cooperation in a particular case may provide strong inducement to falsify in that case). Because the truth concerning the benefits Justice would receive in exchange for his testimony might have influenced the jury's view of Justices' trustworthiness, truthfulness and credibility, there is a reasonable probability that, had the evidence been disclosed to the defense, or the false impressions corrected, the result of the proceeding would have been different. In the present case, the evidence in question was material because it was impeaching and had the jury been informed of the truth, they may have disregarded Justices' testimony as being unreliable and untrustworthy.

IV. EVIDENCE THAT HAS NOT PREVIOUSLY BEEN PRESENTED TO THE COURT REQUIRES THE REVERSAL OF THE CONVICTION IN THE INTEREST OF JUSTICE, WHERE THE STATE RELIED UPON FALSE INFORMATION, FALSE TESTIMONY AND FABRICATED EVIDENCE TO OBTAIN THE CONVICTION.

Applicant contends that the prosecutor knew its star witness, Hugh Justice, was committing perjury when he claimed applicant helped him steal all of the goods subject to the prosecution and that he knew or should have known, that Detective Scott Arnald was testifying falsely when he claimed he took photos of the campsite and while conducting a search of the camper, he allegedly found bill of sales that had applicants name on them and suggested applicant created them to claim lawful ownership of the stolen goods.

Applicant maintains the evidence proves beyond a preponderance of the evidence, that the prosecutor had this knowledge. First, the prosecutor told the judge outside the presence of the jury, that Justice was lying about applicants involvement in the theft. (Tr. Trans. pgs. 261, lines 12-15; pg. 262, lines 4-6 and pg. 263, lines 10-11). In front of the jury he maintained Justice was telling the truth. (Tr. Trans. pg. 353, lines 16-19; pg. 355, lines 18-22). Following the conviction, Scott Arnald testified in the Federal law suit, that he never took any photos and did not conduct a search of the camper or seize any evidence. (Deposition Trans. of Scott Arnald, Appendix pg. 459, lines 19-25; pg. 463, lines 14- pg. 465, line 2).

First, the State suggests that applicant has failed to produce the deposition testimony of Scott Arnald and therefore his claims are unsupported. This is false. Applicant provided the testimony in the Appendix to his Summary Judgment Motion and those records are apart of this courts files. Secondly, the State suggests that a three year delay between Arnald's in-court testimony and his deposition testimony caused him to forget details of the case. This argument is not supported by any evidence. Scott Arnald did not testify nor provide an affidavit in which he alleged that he had forgotten important events due to the delay. Moreover, it is unlikely that Arnald would forget details of a case as memorable as this one. Arnald had been sued in Federal Court prior to his in-court State trial testimony and that case remained active until after his deposition testimony three years later. Arnald was constantly giving affidavits and being questioned by his attorney concerning the details of his actions with regard to the Federal law suit. It is not credible to believe that he would just forget taking photos, conducting an investigation and discovering evidence in the camper of the bill of sales for which he had previously testified, unless his in-court State testimony was

made-up as applicant had always maintained.

Next, the State maintains that applicant did not object to the bill of sales being placed into evidence and should not be allowed to complain of them at this late date. First, because applicant disagreed with the in-court testimony given by Arnold that he had found them while conducting a search of the camper, is not sufficient grounds for an objection. Applicant could not have objected on the basis of a subsequent conflicting testimony that was also given under oath, when it had not yet occurred.

Finally, the State suggested that the evidence "is such that it will probably not change the result if a new trial is granted because there is substantial evidence in the record to indicate that applicant knew the items were stolen." The State points to Mr. Justices' testimony in the record that applicant was involved in the thefts. However, the State fails to recognize that applicant is also challenging that very testimony as being false and that the prosecutor knew it and allowed it to go uncorrected. If the jury had been informed by the prosecution that Justice had lied when he testified and implicated applicant in the thefts of the goods, and had the jury known that Arnold was lying or had given another contradicting testimony that he had not found the bill of sales, then applicants argument that Justice was lying to help himself and that Arnold had fabricated the bill of sales to overcome the federal law suit would not have seemed so weak.

The States entire case rested on fabricated evidence and false testimony. The courts have been clear that a "conviction obtained by the use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". Simpson v. Moore, 627 S.E.2d 701 (2006); United States v. Rivera Pedin, 861 F.2d 1522, 1529-30 (11th Cir. 1988). The extremely damaging testimony of Justice and Arnold leads to the inescapable conclusion that a reasonable probability exists that the results of the trial would have been different had the State corrected the false testimony when it occurred. The prosecutors deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. Riddle, supra, at 75.

CONCLUSION

WHEREFORE, Premises considered, Applicant respectfully requests that this Honorable Court grant applicants claims for the reasons given in applicants proposed PCR order.

April 7, 2016

Respectfully submitted,

James Douglas Tinsley, Sr.
 s/ James Tinsley, # 071943
 Trenton C.I. 3-C-11
 84 Greenhouse Road
 Trenton, S.C. 29847

CERTIFICATE OF SERVICE

I, James Douglas Tinsley, Sr., hereby certify that I did cause the foregoing post-PCR hearing brief and the proposed PCR order to be served upon all counsel of record this 11th day of April, 2016, by placing a true and correct copy in the U.S. mail, with proper postage affixed thereto, and addressed as follows:

Patrick L. Schmeckpeper
 Assistant Attorney General
 P.O. Box 11549
 Columbia, S.C. 29211

James Douglas Tinsley, Sr.
 James Douglas Tinsley, Sr.



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 2016 APR 13 P 4:43

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)
James Tinsley,)
S.C.D.C. No. 171943,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2013-CP-37-0272

**RETURN TO APPLICANT'S OBJECTION
AND MOTION FOR RECONSIDERATION**

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PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections pursuant to orders from the Oconee County Clerk of Court. Applicant was indicted by the Oconee Grand Jury for Receiving, Possessing, Concealing, Selling, or Disposing of a Stolen Vehicle over \$5,000 pursuant to S.C. Code §16-21-80(30) (2008-GS39-881), and four counts of Receiving Stolen Goods over \$5,000 (2008-GS-39-882 through 885). Applicant was tried before a jury, representing himself *pro se*, and found guilty as charged. After consolidating indictments 882 through 884, Judge Nicholson sentenced Applicant to ten years imprisonment suspended on service of seven years and five years probation for both the consolidated indictment and the stolen vehicle indictment, and five years imprisonment suspended to five years probation on the remaining indictment. The sentences were to be served consecutively. Judge Nicholson made restitution to various victims a condition of probation.

A timely notice of appeal was filed and perfected by Tristan Shaffer, Esq., of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. James Douglas Tinsley, (2012-UP-321, filed

ENTERED
COMPUTER

DISCUSSION

Under Rule 56, SCRPC, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

In the present case, Applicant conceded at the evidentiary hearing when making his motion for summary judgment that there were no factual issues in dispute, but that each issue was "part of the record," and "could be resolved by looking at the trial transcript." PCR Tr. p. 11. Respondent agrees, and does not dispute, for purposes of this motion, that Applicant was given a different sentence than his co-defendant; that Applicant was sentenced to consecutive terms of imprisonment; that Applicant exercised his rights to proceed to trial and represent himself *pro se*; and that Applicant was engaged in a civil action against the Oconee County Sheriff's Department at the time of his trial. With respect to Applicant's second issue, Respondent does not dispute for purposes of this motion that Applicant was indicted outside a term of General Sessions. Accordingly, summary disposition is appropriate.

I. Sentencing

Applicant alleges his consecutive sentences violate equal protection of the law, and that he was given a disparate sentence in retaliation for his legal activities. Specifically, he contends

that the trial judge issued a vindictive sentence in retaliation for having exercised his rights to a jury trial, self-representation, and redress of grievances for the return of his property.

As evidenced for this allegation, Applicant argues the disparity between his sentence and his co-defendant's sentence creates a presumption that his sentence was the result of improper prejudice or vindictive and corrupt motive, as well as the fact that the trial judge ruled against him on a number of issues.

1. Applicant's sentence was lawful.

A trial judge is allowed broad discretion in sentencing within statutory limits. Garrett v. State, 320 S.C. 353, 465 S.E.2d 349 (1995). A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against the state. Id.

A trial judge generally has wide discretion in determining what sentence to impose. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. Id.

Respondent submits Applicant was sentenced within the statutory limits. He was sentenced for ten (10) years for possession of a stolen vehicle (2008-GS-37-0881); five (5) years for receiving stolen goods (2008-GS-37-0885); and ten years for receiving stolen goods (2008-GS-37-0882, 0883, and 0884). See S.C. Code § 16-21-80 (2008); S.C. Code § 16-13-180 (2008); S.C. Code § 16-13-180 (2008). Understandably, Applicant may have preferred concurrent sentences. However, as discussed in Respondent's post-hearing memo, there was evidence presented at trial supporting the judge's finding that the offenses were separate and distinct offenses. In fact, Applicant was observed with a stolen six wheeler "towards the end of

January,” Trial Tr., p. 140, with stolen four wheelers two weeks earlier, Id., and an RV camper that went missing in December, Trial Tr., p. 144. Further, many of the stolen items were taken from distinct victims. Trial Tr., p. 144-153; 149; 156-59. The Supreme Court of South Carolina has affirmed consecutive sentences on similar facts. See Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009) (finding three separate armed robberies on different days, at different locations, and involving different victims were separate and distinct crimes, were not inextricably connected, and did not share an immediate temporal proximity).

2. Applicant has not presented any specific facts which would indicate his sentence was the result of prejudice or vindictiveness.

Applicant has failed to raise any specific facts which would indicate his sentence was the result of prejudice or vindictiveness. See Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on the mere allegations or denials contained in the pleadings but rather must come forward with specific facts showing there is a genuine issue for trial). Instead, he has made conclusory assertions, none of which provide any actual support for his allegation.

Respondent does not dispute, for example, that the judge ruled against Applicant on a number of issues at trial.³ However, the fact that a trial judge ultimately rules against a litigant is not proof of prejudice by the judge. See Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009). This is true even if it is later held the judge committed error in his rulings. Id.

In addition, there is nothing in the record or in the pleadings that indicate vindictiveness or prejudice as a result of Applicant exercising any of his rights. A trial judge abuses his

³ The trial judge also granted part of Applicant’s motion to consolidate his indictments. Trial Tr., p. 332.

discretion in sentencing when he considers the fact that the defendant exercised his right to a jury trial. Davis v. State, 336 S.C. 329, 332, 520 S.E.2d 801, 802 (1999). Applicant, however, has failed to raise specific facts indicating such prejudice with respect to his right to trial, his right to proceed *pro se*, or his civil lawsuit with the Oconee County Sheriff's Department.⁴ Compare State v. Hazel, 317 S.C. 368, 369-70, 453 S.E.2d 879, 879-80 (1995) (remanded for resentencing where trial judge's statements indicated he relied heavily on the defendant's exercise of his right to a jury trial in determining sentence).

Finally, Applicant's contention that an improper motive should be presumed because his sentence was issued after he exercised a legal right is illogical and unsupported by law. Applicant's Motion to Reconsider, p. 2-3. Without a doubt, an individual may not be punished for exercising a protected statutory or constitutional right. U.S. v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485 (1982). There is, however, no presumption of vindictiveness where two co-defendants receive different sentences. The presumption Applicant cites to in Goodwin comes from North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969), and refers only to cases where the same defendant has received heavier sentence after having a conviction vacated, and then given a lengthier sentence following retrial.⁵ In the absence of such a presumption, a defendant must prove actual vindictiveness to obtain relief. State v. Hilton, 291 S.C. 276, 279, 353 S.E.2d 282, 284 (1987). Applicant has failed to raise any specific facts which would prove vindictiveness. See Garrett at 356, 465 S.E.2d 349 at 350 (A sentence is not excessive if it is within the statutory limits and there are no fact supporting an allegation of prejudice).

⁴ Respondent would point out the trial judge was not a party to the civil lawsuit, and Applicant has not raised any facts which would support his allegation that the trial judge and the solicitor colluded against him as a result of that lawsuit.

⁵ As the Supreme Court of South Carolina has pointed out, in the years since the United States Supreme Court decided Pearce, it has interpreted and restricted the rule several times. State v. Hilton, 291 S.C. 276, 277-78, 353 S.E.2d 282, 284 (1987).

Accordingly, summary judgment is appropriate, and Applicant's motion to reconsider should be denied.

II. Irregularities in the Indictment

Applicant next argues that he was denied due process of law under both his federal and state constitutional and statutory rights where the state did not obtain a lawful true bill indictment. Specifically, Applicant alleges that his indictment was deficient because the grand jury convened outside a term of general sessions.

On June 28, 2007, then Chief Justice Jean Hoefer Toal issued an order outlining the authority of judges designated as a chief judge for administrative purposes in circuit court. That order indicates in paragraph nine (9) that the chief judge for administrative purposes may convene the grand jury at times other than during a term of general sessions.⁶

To the extent Applicant argues in his post-hearing motion that the order took place before his conviction, Respondent respectfully submits he is mistaken as to the date the order was issued.

To the extent Applicant argues the administrative order is contrary to the laws of this State, Respondent submits this Court's ruling in granting the State's motion for summary judgment was appropriate, and supported by the Supreme Court's Order. A finding by this Court that the Supreme Court issued its order in error would be inappropriate in light of the structure of our judicial system. See American Fast Print, Ltd. v. Design Prints of Hickory, 288 S.C. 46, 47, 339 S.E.2d 516, 517 (Ct. App. 1986) ("The Supreme Court may want to grant certiorari in the instant case and modify or overrule its previous decision, but this court has no authority to change it"); see also Bain v. Self Memorial Hospital, 281 S.C. 138, 141, 314 S.E.2d 603, 605

⁶ This Order has been amended a number of times since its initial filing, most recently on February 4, 2011. None of the amendments have altered the underlying provision at issue in this case.

(Ct. App. 1984) ("Where the law has been recently addressed by our Supreme Court and is unmistakably clear, this court has no authority to change it"). Accordingly, this Court's order granting summary judgment was appropriate and Applicant's motion should be denied.

CONCLUSION

WHEREFORE, the Respondent respectfully requests the court deny Applicant's claim of ineffective assistance of counsel for failure to meet the required burden of proof and dismiss the post-conviction relief application.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

PATRICK L. SCHMECKPEPER
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, S.C. 29211

Apr. 1 28, 2016.

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

2016 MAY 13 A 11:21

STATE OF SOUTH CAROLINA	}	In the COURT OF COMMON PLEAS
COUNTY OF OCONEE		
		C/A NO(s); 2013-CP-37-272 2014-CP-37-737
JAMES Tinsley, #171943,	)	
Applicant,	)	<u>APPLICANTS REPLY BRIEF</u>
vs.	)	<u>TO RESPONDENTS RETURN</u>
STATE OF SOUTH CAROLINA,	)	<u>TO APPLICANTS MOTION FOR</u>
Respondent.	)	<u>Reconsideration</u>
	)	

ON February 10, 2016, this COURT granted the State partial Summary Judgment on two issues. Applicant submitted a Motion For Reconsideration dated February 12, 2016 and the State has Filed a Return to that Motion. Applicant Received that Return on May 4, 2016 and this Reply BRIEF Follows:

ISSUES

I. Applicant WAS given a disparate sentence in Retaliation For his legal activities.

The State suggests that the trial judge did not abuse his authority or act vindictively because he sentenced Applicant within Statutory limits. Applicant disagrees.

First, the Failure to merge all of the offenses into a single offense violated previous caselaw on the matter that involved nearly identical facts and circumstances as

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Found in this case, Stevens v. State, 617 S.E.2d 366 (2005) (holding possession of multiple stolen goods from North Carolina found in storage facility in South Carolina constitutes single offense).

Secondly, by giving Applicant consecutive sentences with a total time far beyond the maximum sentence allowed for a single offense, the judge violated double jeopardy.

United States v. Kaplan, 588 F.2d 71 (4th Cir. 1978)

(although one may be convicted for both "possession" and "manufacturing" of illegal firearms, court may not impose total sentence exceeding maximum penalty provided for in one violation). The maximum sentence applicant could have received on a single offense was ten (10) years.

Applicant was given a total of fourteen (14) years.

Finally, convicting applicant of "receiving stolen goods" and "possession of a stolen vehicle" for the same ATVs, trailers and events, violates double jeopardy. Bull v. United States, 470 U.S. 856, 861 (1985) (a defendant may not be convicted of both "possession" and "receiving" the same handgun).

This is so because "receiving stolen goods" and "possession of a stolen vehicle" contain the same elements and are not separate and distinct offenses under United States v. Blockburger, 284 U.S. 299 (1932). In Brown v. Ohio, 97 S.Ct. 2221, 2225-26 (1977), the Supreme Court held that separate statutory crimes need not be

identical - either in constituent elements or in actual proof - in order to be the same within the meaning of the Constitutional prohibitions. Here, Applicant could have been charged under Receiving stolen goods instead of possession of a stolen vehicle for the trailer which could be considered a "vehicle" or "stolen goods". Applicant was charged both ways and convicted of both, calling an item a "vehicle" in one indictment and "stolen goods" in another, does not justify a separate charge particularly when both criminal statutes require proof of the same elements.

Therefore, it is clear that the trial judge did not sentence Applicant within the statutory limits nor according to legislatures intent. The preponderance of the evidence and non-disputed circumstances suggest that the only reason for giving Applicant such a lengthy and unconstitutional sentence would have been in retaliation for applicants legal activities. There is no reasonable justifiable ground for giving someone who had no prior felony convictions such a lengthy consecutive sentence that is clearly unlawful according to prior case law, unless it was being done in retaliation for Applicants exercise of his legal rights.

II. Applicant was denied due process of law under both His Federal and State Constitutional and statutory rights where the state did not obtain a lawful true Bill Indictment. (3)

Applicant contends that he had a due process right to have an indictment issued by a legally constituted grand jury according to the statutory laws of this state, which required the grand jury to convene during a term of General Sessions Court and be presided over by a General Sessions Court Judge, S.C. Code, § 14-9-210. Additionally, Applicant maintains that he has a Federal Equal Protection Right that requires the state to comply with those statutory laws in the operation of their grand juries, Rose v. Mitchell, 443 U.S. 545, 557 (1979).

The States Return is based on the argument that Chief Justice Jean Toal issued an order on June 28, 2007, which authorized Circuit Court Judges to convene grand juries at times other than during a term of General Sessions Court and that this Court has no authority to change it.

TRUE OR NOT, the State has missed the point. First of all, the States Return did not address Applicants Federal Due Process and Equal Protection claims, but only suggests that Applicants state statutory rights had been modified by the order of Justice Toal.

Secondly, even if Justice Toal's order were controlling, the state failed to comply with the order. To conduct a grand jury proceeding outside a term of General Sessions Court, the Chief Circuit Court Judge must

"file" with the South Carolina Court Administrators, an order of intent to conduct the proceeding outside a term of General Session's Court. The Circuit Court Judge must still preside over the proceedings. Neither of these things happened in this case and the lack of a Judge's supervision opened the door to the prosecutor to mislead the grand jury concerning their duties. The evidence before this court raises a question as to whether the grand jury actually considered any evidence or simply acted as a rubber stamp. SEE: State v. Gentry, 363 S.C. 93, 610 S.E.2d 194 (2005) (A Grand Jury exists not merely to investigate and accuse, but acts as a curb on the unbridled power of the sovereign). HERE, According to the court's records, the grand jury true billed 230 indictments in four hours which means they spent approximately one minute on each indictment. This would be sufficient to sign each indictment, but would be insufficient to consider evidence, testimony and to vote on each indictment. Clearly, the grand jury did not put the state to any test, but simply signed off on all the indictments. This failure to comply with their statutory duties could have been prevented had their proceedings been overseen by a Circuit Judge. Instead, a week later, a Circuit Judge signed off on their proceedings in an attempt to cover-up these insufficiencies. Even these failures to follow their own rules, orders or procedures con-

stitutes a due process violation. Stout City v. Dakota, 260 U.S. 441 (1923) (is treated arbitrarily and capriciously IF no reasonable basis exists for failing to follow procedures).

Thirdly, and most importantly, the state fails to recognize that Justice Tol's order was meant to operate in conjunction with the courts ruling in Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005). The order does not stand for the proposition that a defendant has no due process right to be indicted according to state statutes, but rather, recognizes that no harm will be had from an alternative process IF NO objection is made. Evans made it clear that a legitimate due process claim existed IF the indictment is not obtained from a legal grand jury. "One who demands and is refused the right to be tried for a crime charged against him only upon an indictment presented by a legal grand jury, ... may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law." Evans, supra, at 518. However, that due process claim can be waived IF NO objection is lodged "prior to the entry of the verdict by the jury." Id.

What is missed by the state is that Justice Tol was attempting to alleviate crowded courthouses caused by conducting Grand Jury proceedings at a time when courts are attempting to conduct criminal trials and guilty pleas.

Justice Toal clearly recognizes that most charges result in guilty pleas by defendants who could care less whether the indictment was obtained through a legally constituted grand jury. In fact, one pleading guilty can actually waive the presentment of any indictment. In Justice Toal's view, courts should be allowed to conduct grand jury proceedings outside the scope of General Sessions Court as long as they create a proper record of the decision by filing its intention with the court administration so any defendant wishing to object can do so. IF according to Evans no objection by counsel or the defendant is made, the issue is waived and there is no harm, no foul.

The problem in this case is the court did not place applicant on notice of its alternative grand jury process by filing anything with the court administration and this constitutes a violation of Justice Toal's order itself.

Moreover, the indictment did not indicate that it was obtained according to Justice Toal's order so as to give applicant an opportunity to object pursuant to Evans. Here, applicant certainly would have objected because at the time the grand jury proceedings were held, Justice was not a witness for the state and the alleged bill of sales had not "magically" been discovered, without

Justices' testimony and the bill of sales, there would have been no evidence to suggest Applicant had knowledge of the goods stolen character, or, was more than merely present around the stolen goods. Had the grand jury not been unsupervised, they could not have been manipulated and had they put existing evidence to any test, they would not have true billed the indictments.

Moreover, the indictments contained false and misleading information by claiming that the indictment was obtained "during a term of General Sessions COURT" when in fact it was not. This misrepresentation of the events constituted an interference by the state that prevented Applicant from objecting prior to the entry of the verdict by the jury. In other words, this constituted an interference by officials that made compliance with the objection rule impracticable or unknown so as to constitute an excuse for any claimed procedural default, Strickler v. Greene, 527 U.S. 263 (1999) (IF state officer led defendant to believe that a violation had not occurred, cause is shown why defendant did not object to the violation at trial).

Likewise, both our state civil and criminal procedures recognize that "surprise", "fraud", "misrepresentation" or

"other misconduct" may constitute "good cause shown" or an "excuse" for a procedural default. see generally: S.C.R. Civ. P., Rule 55(c); 60(b); New Hampshire Ins. Co. v. Bay Corp., 312 S.C. 45, 435 S.E.2d 377 (1993) (applying civil Rules of procedure); Kelly v. Manning, 237 S.C. 364, 117 S.E.2d 362, 368 (1960) (recognizing that procedural defaults may be excused if cause is shown for the failure to raise issue sooner); Teleguz v. Zook, 806 F.3d 803, 807 (4th Cir. 2015) (quoting House v. Bell, 547 U.S. 518, 536 (2006) (exception exists when "the prisoner demonstrates cause for the default and prejudice from the asserted error").

Here, the prosecutor "misrepresented" the facts and lead applicant to believe that he had been lawfully indicted "during a term of General Sessions Court" when in fact it had NOT. This came as a complete "surprise" and prevented applicant from entering an objection prior to the entry of the verdict by the jury. Therefore, cause has been shown for why applicant did not object sooner and this cause constitutes an excuse for the procedural default.

Contrary to the States view, Applicant is not attempting to get this court to overrule a previous Supreme Court decision. In fact, this issue has

never been considered by the entire Supreme Court. Applicant is asking this court to enforce a previous court decision in Evans, supra, and to recognize that an excuse exists in this case for the failure to object prior to the entry of the jury's verdict.

Alternatively, this court could simply find that the State did not comply with the requirements of Justice Toals' order and that that failure constitutes an unjustified deviation from requirements that are enforced against other similarly situated defendants. In other words, Applicant's Federal Equal Protection Rights were violated because the State did not comply with statutory law or Judge Toals' order and this act of circumventing the procedures allowed an unsupervised grand jury to be manipulated into neglecting their statutory duty.

For the reasons stated herein, Applicant believes that he is entitled to relief in his favor and this court should amend its prior decisions to grant the State partial summary judgment.

May 5, 2016

Respectfully submitted,

s/ James D. Tinsley JR
 JAMES Tinsley, #171913
 Manning, C. I., WTA-18T
 502 Beckman Drive
 Columbia, S.C. 29203

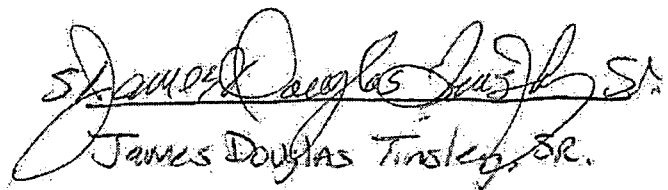
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BEVERLY H. WHITFIELD
CLERK OF COURT

2016 MAY 13 A 11:21

CERTIFICATE OF SERVICE

I, James Douglas Tinsley, Sr., hereby certifies that I did cause the foregoing Reply Brief to be served upon counsel of Record this 12th day of MAY, 2016, by placing a true and correct copy in the U.S. mail, with proper postage affixed thereto, and addressed as follows:

Patrick L. Schmeckpeper
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211


James Douglas Tinsley, Sr.

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

James Tinsley,
S.C.D.C. No. 171943,

C.A. No. 2013-CP-37-0272

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED OCONEE COUNTY, SC
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CLERK OF COURT
2016 MAY 16 P 4:37

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections pursuant to orders from the Oconee County Clerk of Court. Applicant was indicted by the Oconee Grand Jury for Receiving, Possessing, Concealing, Selling, or Disposing of a Stolen Vehicle over \$5,000 pursuant to S.C. Code §16-21-80(30) (2008-GS39-881), and four counts of Receiving Stolen Goods over \$5,000 (2008-GS-39-882 through 885). Applicant was tried before a jury, representing himself *pro se*, and found guilty as charged. After consolidating indictments 882 through 884, Judge Nicholson sentenced Applicant to ten years imprisonment suspended on service of seven years and five years probation for both the consolidated indictment and the stolen vehicle indictment, and five years imprisonment suspended to five years probation on the remaining indictment. The sentences were to be served consecutively. Judge Nicholson made restitution to various victims a condition of probation.

A timely notice of appeal was filed and perfected by Tristan Shaffer, Esq., of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences in an unpublished opinion. State v. James Douglas Tinsley, (2012-UP-321, filed

May 30 2012). A pro se petition for writ of certiorari was filed at the South Carolina Supreme Court on October 2, 2012. The South Carolina Supreme Court denied certiorari from his direct appeal on February 6, 2014. The Remittitur was issued on February 18, 2014.

While his direct appeal was pending, Applicant filed an application for post-conviction relief on April 4, 2013. Respondent filed its Return and Motion to Dismiss without prejudice on or about July 23, 2013. Thereafter, on September 13, 2013, the Honorable Alexander Macaulay issued a conditional order dismissing the application without prejudice, filed September 30, 2013. Applicant's appeal was subsequently dismissed, and the State withdrew its request to dismiss the application.¹ An evidentiary hearing was convened into the matter on February 10, 2016. Applicant was present proceeded *pro se*.² Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf. Applicant's plea counsel also testified.

At the outset of the hearing, Applicant made a motion for summary judgment. That motion was denied. Respondent subsequently moved for partial summary judgment on two issues. The Court granted Respondent's motion, and summarily dismissed Applicant's allegations that 1) his sentence was disparate from his co-defendant as a result of the trial judge's vindictiveness; and 2) that defects in his indictment violated his Due Process rights. Applicant subsequently filed an objection and motion for reconsideration on these issues. Respondent filed its Return.

Following testimony, the Court directed parties to submit written memoranda summarizing arguments presented at the evidentiary hearing.

¹ In the interim, Applicant also filed an application on February 16, 2014 (2014-CP-37-0737). That application was merged into the present proceeding and dismissed by the Honorable ! Cordell Maddox in a written order signed December 1, 2015, and filed December 10, 2015.

² Applicant's appointed counsel, Hugh Welborn, Esquire, was relieved via written order filed March 14, 2016.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject guilty plea, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

APPLICANT'S BURDEN

In a PCR action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)).

DISCUSSION

Ineffective Assistance of Appellate Counsel

Applicant's first allegation is one of ineffective assistance of appellate counsel. A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id., citing Evitts, 469 U.S. 387, 105 S.Ct. 830 (1999). Appellate



counsel is not required to raise every nonfrivolous issue that is presented by the record,³ but instead has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).

"For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308 (1983)); see also Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985) (Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.* Applicant has failed to meet his burden with respect to each of his allegations.

- a. Failure to argue the trial judge erred in refusing to charge the jury on the distinction between larceny and receiving stolen goods, where if the jury found Applicant was the thief who stole the goods, the jury must find him not guilty of the indicted offense.

This Court finds appellate counsel was not ineffective for failing to raise this issue. First, it was not adequately preserved for appeal. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. State v. Nichols, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997). Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review. State v. Morris, 307

³ Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991). Moreover, the Supreme Court has held that a jury charge must be requested or objected to on the record in order to remain preserved for appeal, *even if* a proposed charge was submitted to the trial court in writing. See Whipple v. State, 324 S.C. 43, 476 S.E.2d 683 (1996).⁴

Applicant did not, at any point on the record, ask the trial judge to make the requested charge. Accordingly, this Court finds counsel could have reasonably decided that focusing in on an issue that was not properly preserved was not the best route to getting Applicant's conviction overturned. Applicant has therefore failed to meet his burden to overcome the "strong presumption that counsel rendered effective assistance" with respect to this allegation. This allegation is therefore be denied and dismissed.

- b. Failure to argue the trial judge erred in refusing to charge the jury with "mere presence" and "abandonment."

The trial judge explained at trial that his reasoning for declining to charge abandonment was that there was no testimony that would indicate any abandonment. Trial Tr., p. 335. This Court finds the trial judge's ruling was correct, and that there was no basis for appealing this issue.

With respect to a jury charge on "mere presence," Applicant abandoned that issue at trial. While the trial court initially seemed resistant to charging the jury on mere presence, it eventually conceded that it may have "misunderstood the issue." Trial Tr., p. 338. Rather than continue to press his argument, however, Applicant withdrew his request to have mere presence charged:

"If it's complicated, would it be all right that I be allowed to argue constructive possession and mere presence to the jury and just your other charge cover the rest of it?"

⁴ See also State v. Johnson, 333 S.C. 62, 64, n.1, 508 S.E.2d 29, 30, n.1 (1998) (clarifying the issue preservation requirements addressed in Whipple, *supra*).

Trial Tr., p. 338. The trial judge acquiesced, and the issue was resolved. Applicant received what he asked for. C.f., State v. Wilson, 389 S.C. 579, 583-84, 698 S.E.2d 862, 864 (Ct. App. 2010) (finding where party receives favorable ruling in form of curative instruction, no appealable issue absent contemporaneous objection that curative instruction was inadequate; “[o]n the other hand, when an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error”); see also State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (A party may not complain of an error which his own conduct has induced). Applicant ultimately argued mere presence to the jury during his closing arguments. Trial Tr., p. 347. Accordingly, there was no issue for appeal. This allegation is therefore denied and dismissed.

- c. Trial judge erred in failing to grant a continuance or otherwise provide funds for an expert handwriting analysis to dispute the State’s surprise evidence.

This Court finds this issue is not a “significant and obvious issue[] on appeal.” See Gray v. Greer, supra. 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 [the defendant]. State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957). Reversals of a refusal of continuance are about as rare as the proverbial hens’ teeth. Id. There is no indication in the record that the trial court abused its discretion in refusing to grant a continuance, particularly where the Applicant’s grounds were the pendency of several motions – most of which had been raised right before trial. Trial Tr., p. 11-12.

Nor is there any evidence that the trial court erred in finding Applicant’s request for funding for an expert was untimely. The record reflects that Applicant did not file his request

until a mere *ten days* before his trial. Trial Tr. p. 22. Applicant has failed to meet his burden with respect to this allegation. It is therefore denied and dismissed.

- d. Trial judge erred in failing to merge all of the indictments into a single offense which violated S.C. Code § 16-13-180, and the multiple convictions and consecutive sentences constitute a double jeopardy violation;

This Court finds there was no error as the indictments alleged sufficient facts to preclude consolidation, and there was evidence presented at trial indicating that Applicant actually received the stolen goods on different days. The relevant statute provides that "the receipt of multiple items in a single transaction or event constitutes a single offense." § 16-13-180(D). Indictments -882, -883, and -884 alleged that on January 22, Applicant received a number of stolen items. Based on those allegations and Applicant's motion, the trial judge merged -882, -883, and -884 into one charge. Trial Tr., p. 332. The trial judge did not merge the remaining two indictments, because they were alleged to have occurred on different days.

Evidence presented at trial supports the multiple indictments. Applicant was observed with a stolen six wheeler on January 30th or "towards the end of January." Trial Tr. p. 140. Stolen four wheelers were seen in Applicant's possession roughly two weeks earlier. *Id.* The four wheelers were reported stolen on January 15th. Trial Tr. p. 111. One witness, who rented several storage units to Applicant, testified that he saw Applicant photographing "brand-new-looking ATV's" in the storage units on one occasion. Trial Tr., p. 118. He said that a number of trailers came in "at a later time." Trial Tr., p. 119. Darrell Slusser, an RV dealer, testified that he had an RV camper turn up missing December 11. Trial Tr., p. 144. He testified that the camper Applicant had been using was the camper that had been stolen from his lot. Trial Tr., p. 146-47.

Because the State alleged facts sufficient to justify multiple indictments – and there were facts presented at trial from which a jury could reasonably find Applicant received the stolen

items at different times and as part of different events – this Court finds the trial court appropriately denied in part Applicant's motion to consolidate. Accordingly, Applicant has failed to meet his burden to prove appellate counsel was deficient in failing to brief this issue. It is therefore denied and dismissed.

- e. Trial judge erred in refusing to conduct an in camera suppression hearing or in failing to allow Applicant an opportunity to present his own evidence in support of his motion.

Applicant has also failed to meet his burden with respect to this allegation. The trial judge heard testimony from law enforcement,⁵ and found suppression was not necessary at the conclusion of Officer Smith's testimony. In any event, this Court finds Applicant has failed to make even a threshold demonstration of a legitimate expectation of privacy in connection with the purportedly searched premises – it seems unlikely that Applicant would have been able to prevail on a claim that he had a legitimate privacy interest in an outdoor area owned by a third party. See, e.g., State v. Herring, 387 S.C. 201, 209, n. 4, 692 S.E.2d 490, 494, n. 4 (2009) (What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection); State v. Crane, 296 S.C. 336, 341, 372 S.E.2d 587, 589 ("No property law concept nor societal 'understanding' . . . accords any appellant any expectation of privacy in another individual's woods"). This allegation is therefore be denied and dismissed.

⁵ Officer David Smith testified in detail as to what led him to obtain search warrants of Applicant's camper. After obtaining a valid warrant to search Applicant's rented storage unit at another location, Trial Tr., p. 188, law enforcement recovered a number of stolen four wheelers and a stolen trailer, but were still searching for more stolen items. Trial Tr., p. 188-89. Police were then able to intercept Applicant in his vehicle en route to his campsite. Trial Tr., p. 190-91. One of the passengers in Applicant's vehicle, Mr. Boles, informed police that there were trailers and ATVs in Applicant's campsite. Id. Mr. Boles led police to the campsite, where they saw several trailers and ATVs. Trial Tr. p. 192. Law enforcement ran the tags, found they were stolen, and subsequently obtained a search warrant. Trial Tr. p. 192-93.

PROCEEDING PRO SE*Ineffective assistance of appellate counsel*

Applicant claims that his rights were violated when he was not given standby counsel or access to legal resources leading up to his trial.

Applicant first claims appellate counsel was ineffective for failing to argue his waiver of counsel was rendered involuntary because he did not receive the assistance of standby counsel in the time period leading up to trial. Applicant conceded at the evidentiary hearing that he had the assistance of standby counsel during his actual trial. PCR Tr. p. 76.

The Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding *pro se*. United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998). The Fourth Circuit has also noted that lower courts have "broad discretion" to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense. Id. There is no Sixth Amendment right to hybrid representation. State v. Stucky, 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998). Moreover, "[a] defendant does not have a constitutional right to choreograph special appearances by counsel." Id.

Applicant's rights were not violated. He made a valid waiver of his right to counsel, as discussed below, and was not entitled to hybrid representation. Further, even *at trial*, Applicant's representations to the judge indicate he was aware that he was not entitled to counsel. He stated:

"I understand I might not have a right to represent myself and have an attorney, but I believe it's within the court's discretion to give me someone who can assist me, getting some of this stuff done."



Trial Tr., p. 10 (emphasis added). Nor did Applicant, at any point, reassert his right to counsel after being denied standby counsel prior to the trial. C.f. State v. Reed, 332 S.C. 35, 44, 503 S.E.2d 747, 751 (“While the right to counsel once waived is no longer absolute, there is a strong presumption that a defendant’s post-trial request for the assistance of counsel should not be refused”). In light of the record, including Applicant’s representations at trial, this allegation is denied and dismissed.

Valid Waiver

This Court also finds Applicant’s waiver was voluntary in light of his background, knowledge of the legal system, performance at trial, and testimony at the evidentiary hearing. It is well-established that a defendant may waive the right to counsel and proceed *pro se*. Dearybury v. State, 367 S.C. 34, 39, 625 S.E.2d 212, 215 (2006) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Although a defendant’s decision to proceed *pro se* may be to the defendant’s own detriment, it “must be honored out of that respect for the individual which is the lifeblood of the law.” Id. In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se*, with “eyes open,” then the petitioner did not make a knowing and voluntary waiver of counsel and the case should be remanded for a new trial. Watts v. State, 347 S.C. 399, 402-03, 556 S.E.2d 368, 370 (2001).

Absent a specific inquiry by the trial court into the hazards of proceeding *pro se*, reviewing courts must look into the record to determine whether a defendant had sufficient background or was apprised of his rights by some other source. Gardner v. State, 351 S.C. 407, 412, 570 S.E.2d 184, 185 (2002). When determining if an accused has a sufficient background to understand the dangers of self-representation, the courts consider may factors including: (1) the accused’s age, educational background, and physical and mental health; (2) whether the

accused as previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002).

Applicant was between 37 and 38 years old when at trial. The record reflects that he had a tenth grade education, and had been working as a machinist for most of his life. Trial Tr., p. 210. Applicant testified at trial that he had never been treated for alcohol or drug abuse, and had never been treated for mental illness. Id. Applicant testified that he had been examined by a doctor to determine his mental competence to stand trial roughly "15, 16, 17 years ago," and was found competent. Trial Tr., p. 211. Applicant explained at the evidentiary hearing, he clearly has *some* experience in legal matters. Applicant stated that he had been studying the law for roughly twenty (20) years, and had "handled a lot of [his] own cases, civil suits, and things like that." PCR Tr. p. 7. Applicant further testified that he had been conducting legal research in this case. Trial Tr., p. 212. He said that he had been getting his father to "get stuff from the law library and mail to in to [him] at the jail." Id. Applicant testified that he got a previous criminal conviction overturned on post-conviction relief without the assistance of an attorney. Id. Applicant even acknowledged that the fact that Judge Maddox did not give him the specific



warnings of the dangers of representing himself on the record was "not necessarily that big of a deal in this case." PCR Tr. p. 49. He repeatedly emphasized his knowledge and confidence with respect to legal matters: "I think we made it kind of clear that I know a little bit about the law, and so you can go based on my prior knowledge also as to whether or not I would understand what I was waiving." PCR Tr. p. 54. Applicant also conceded at the evidentiary hearing that he was fully aware of the dangers of self-representation at the time of his trial, other than he believed he would receive standby-counsel to assist in research and representation prior to trial. PCR Tr. p. 75. Applicant also appeared to be familiar with the nature of the charges he was being accused of, their potential penalties, as well as a number of possible defenses to them, as evidenced by his use of them at trial. The record reflects that Applicant was represented by counsel before the trial, and that he received the benefit of standby counsel at trial. It does not appear from the record that Applicant was trying to delay or manipulate the proceedings, but rather attempted to represent himself to the best of his abilities. He has continued to represent himself *pro se* in his post-conviction relief proceedings. Clearly Applicant knew he was required to comply with the rules of procedure at trial, as evidenced by the fact that he made motions and objections throughout the course of the proceedings. Similarly, Applicant raised a number of legal challenges during the course of his trial. Applicant moved to suppress evidence pursuant to the Fourth Amendment prohibition on unreasonable searches and seizures. Trial Tr., p. 81. Applicant moved for a directed verdict at the conclusion of his trial, arguing that "one who commits a larceny cannot be found guilty of criminally receiving or possession the property that was stolen." Trial Tr., p. 257-58. There is no evidence that Applicant's waiver resulted from coercion or mistreatment, but rather from his honest belief that he could do a better job representing himself than his appointed attorney.



This Court finds that these factors show Applicant had a sophisticated knowledge of the workings of the legal system at the time of his trial, and was fully aware of the dangers of proceeding *pro se*. In light of those dangers, Applicant made the calculated decision that he could represent himself more effectively than his appointed attorney. This allegation is therefore denied and dismissed.

Brady Violation

Applicant's allegation appears to be that the State failed to disclose information regarding his co-defendant's plea negotiations, constituting a Brady violation. A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). This rule applies to impeachment evidence as well as exculpatory evidence. Id. This Court finds Applicant's allegation of a Brady violation is clearly deficient.

Applicant has failed to show that the evidence that was purportedly suppressed was material to guilt or punishment. Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Sheppard v. State, 357 S.C. 646, 660, 594 S.E.2d 462, 471 (2004). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. In the present case, the evidence in question was clearly not material because it was before the jury and Applicant was still convicted. Applicant asked his co-defendant, Mr. Hogan Hugh Justice, whether as a part of his guilty plea he was required to testify against him. Trial Tr. p. 234. Mr. Justice testified that he "was required to tell the truth." Id. Mr. Justice explained his understanding of his plea – he said there was not a *quid pro quo* arrangement concerning

probation. Trial Tr., p. 248. Instead, he said that he was told to be honest, and that his testimony would be taken into consideration at sentencing. Id. Moreover, the solicitor stated during closing arguments that "[t]he deal was to tell the truth," and that the "State ha[d] a recommendation of a probation sentence," and "to pay back the victims." Trial Tr., p. 353.

Even after hearing this testimony and weighing its impeachment value against Mr. Justice, the jury convicted Applicant. Accordingly, even assuming the solicitor's office failed to comply with the requirements of Brady, Applicant has failed to show a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. This allegation is therefore denied and dismissed.

After-Discovered Evidence

Applicant appears to be alleging that has discovered evidence since his conviction that entitles him to a new trial. In order to warrant the granting of a new trial on the ground of after-discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; and (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

In the present case, Applicant has failed to show that the purported new evidence "is such as will probably change the result if a new trial is granted." Clark, supra. He apparently takes issue with Officer Arnold's testimony, who said that he took pictures inside the camper and located several bills of sale in the cabinets of the camper. Trial Tr. p. 220-21. This Court first notes that the bills of sale introduced at trial were admitted into evidence **without objection**, and authenticated by a prior witness – Officer David Smith. Trial Tr., p. 197-98. Applicant has not



raised any question about Officer Smith's credibility. In any event, the long period of time between trial and the purported deposition⁶ may very well have impacted his memory. Even Applicant conceded that the deposition took place roughly four years after the actual search of the camper. PCR Tr. p. 83.

Even without the bills of sale, there was substantial evidence in the record to indicate Applicant knew the items were stolen. First, Applicant's co-defendant – Mr. Justice – testified that Applicant was aware the items were stolen. Trial Tr., p. 227. He testified that both he *and Applicant* came up with the idea to deal in stolen property jointly, and that Applicant “took the lead” in terms of selling the items on eBay. *Id.* He said that he and Applicant would remove the VIN numbers from equipment, and then replace them with laminated numbers generated on Excel. *Id.*

Second, Applicant was selling these items – many of them brand new – at prices substantially below market value. In fact, the deal Applicant was offering was so good that one of his buyers – Wesley Crawford – was immediately put on notice by friends that he ought to check with police to make sure the four wheeler he bought was not stolen. Trial Tr., p. 108. The four wheeler had “roughly about 60 hours on it,” and was “[b]asically brand new.” Trial Tr., p. 113. Mr. Tinsley sold it for five thousand dollars. *Id.* Testimony from James Haddad, the victim and owner of the Polaris dealership that had been robbed, indicated the four wheeler was worth roughly twelve thousand five hundred dollars. PCR Tr. p. 161. When asked, on cross-examination, whether he was aware that “sometimes things sell for less than they’re worth on eBay,” he responded “[n]ot at that price.” Trial Tr., p. 163-64. As a result, Officer Smith’s

⁶ The later testimony raised by Applicant is not in evidence, and was not presented as evidence by Applicant during the course of the evidentiary hearing.

testimony at trial – *even if* contradicted in a deposition three years later – is not material to the issue of guilt or innocence. This Court therefore request that this allegation be denied.

SUMMARY JUDGMENT

As stated previously, this Court also granted the State's motion for partial summary judgment at the evidentiary hearing on two issues: Applicant's allegations that 1) his sentence was disparate from his co-defendant as a result of the trial judge's vindictiveness; and 2) that defects in his indictment violated his Due Process rights. This Court's findings of fact and conclusions of law on these issues are set forth below.

Discussion

Under Rule 56, SCRPC, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

In the present case, Applicant conceded at the evidentiary hearing when making his motion for summary judgment that there were no factual issues in dispute, but that each issue was "part of the record," and "could be resolved by looking at the trial transcript." PCR Tr. p. 11. This Court agrees. Respondent has not disputed, for purposes of this motion, that Applicant was given a different sentence than his co-defendant; that Applicant was sentenced to consecutive terms of imprisonment; that Applicant exercised his rights to proceed to trial and

represent himself *pro se*; and that Applicant was engaged in a civil action against the Oconee County Sheriff's Department at the time of his trial. With respect to Applicant's second issue, Respondent has not disputed for purposes of this motion that Applicant was indicted outside a term of General Sessions. Accordingly, summary disposition is appropriate.

I. Sentencing

Applicant alleged his consecutive sentences violate equal protection of the law, and that he was given a disparate sentence in retaliation for his legal activities. Specifically, he contended that the trial judge issued a vindictive sentence in retaliation for having exercised his rights to a jury trial, self-representation, and redress of grievances for the return of his property.

As evidenced for this allegation, Applicant argued the disparity between his sentence and his co-defendant's sentence creates a presumption that his sentence was the result of improper prejudice or vindictive and corrupt motive, as well as the fact that the trial judge ruled against him on a number of issues.

1. Applicant's sentence was lawful.

A trial judge is allowed broad discretion in sentencing within statutory limits. Garrett v. State, 320 S.C. 353, 465 S.E.2d 349 (1995). A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against the state. Id. A trial judge generally has wide discretion in determining what sentence to impose. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. Id.

This Court finds Applicant was sentenced within the statutory limits. He was sentenced for ten (10) years for possession of a stolen vehicle (2008-GS-37-0881); five (5) years for

receiving stolen goods (2008-GS-37-0885); and ten years for receiving stolen goods (2008-GS-37-0882, 0883, and 0884). See S.C. Code § 16-21-80 (2008); S.C. Code § 16-13-180 (2008); S.C. Code § 16-13-180 (2008). Understandably, Applicant may have preferred concurrent sentences. However, there was evidence presented at trial supporting the judge's finding that the offenses were separate and distinct offenses. In fact, Applicant was observed with a stolen six wheeler "towards the end of January," Trial Tr., p. 140, with stolen four wheelers two weeks earlier, Id., and an RV camper that went missing in December, Trial Tr., p. 144. Further, many of the stolen items were taken from distinct victims. Trial Tr., p. 144-153; 149; 156-59. The Supreme Court of South Carolina has affirmed consecutive sentences on similar facts. See Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009) (finding three separate armed robberies on different days, at different locations, and involving different victims were separate and distinct crimes, were not inextricably connected, and did not share an immediate temporal proximity). Accordingly, this Court finds Applicant's sentence was lawful.

2. Applicant has not presented any specific facts which would indicate his sentence was the result of prejudice or vindictiveness.

This Court further finds Applicant has failed to raise any specific facts which would indicate his sentence was the result of prejudice or vindictiveness. See Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on the mere allegations or denials contained in the pleadings but rather must come forward with specific facts showing there is a genuine issue for trial). Instead, he has made conclusory assertions, none of which provide any actual support for his allegation.

There is no dispute, for example, that the trial judge ruled against Applicant on a number of issues at trial.⁷ However, the fact that a trial judge ultimately rules against a litigant is not proof of prejudice by the judge. See Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009). This is true even if it is later held the judge committed error in his rulings. Id.

In addition, there is nothing in the record or in the pleadings that indicate vindictiveness or prejudice as a result of Applicant exercising any of his rights. A trial judge abuses his discretion in sentencing when he considers the fact that the defendant exercised his right to a jury trial. Davis v. State, 336 S.C. 329, 332, 520 S.E.2d 801, 802 (1999). Applicant, however, has failed to raise specific facts indicating such prejudice with respect to his right to trial, his right to proceed *pro se*, or his civil lawsuit with the Oconee County Sheriff's Department.⁸ Compare State v. Hazel, 317 S.C. 368, 369-70, 453 S.E.2d 879, 879-80 (1995) (remanded for resentencing where trial judge's statements indicated he relied heavily on the defendant's exercise of his right to a jury trial in determining sentence).

Finally, Applicant's contention that an improper motive should be presumed because his sentence was issued after he exercised a legal right is illogical and unsupported by law. Applicant's Motion to Reconsider, p. 2-3. Without a doubt, an individual may not be punished for exercising a protected statutory or constitutional right. U.S. v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485 (1982). There is, however, no presumption of vindictiveness where two co-defendants receive different sentences. The presumption Applicant cites to in Goodwin comes from North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969), and refers only to cases

⁷ The trial judge also granted part of Applicant's motion to consolidate his indictments. Trial Tr., p. 332.

⁸ Crucially, the trial judge was not a party to the civil lawsuit, and Applicant has not brought to this Court's attention any facts which would support his allegation that the trial judge and the solicitor colluded against him as a result of that lawsuit.

where the same defendant has received heavier sentence after having a conviction vacated, and is then given a lengthier sentence following retrial.⁹ In the absence of such a presumption, a defendant must prove actual vindictiveness to obtain relief. State v. Hilton, 291 S.C. 276, 279, 353 S.E.2d 282, 284 (1987). Applicant has failed to raise any specific facts which would prove vindictiveness. See Garrett at 356, 465 S.E.2d 349 at 350 (A sentence is not excessive if it is within the statutory limits and there are no fact supporting an allegation of prejudice). Because Applicant has failed to raise any specific facts to prove his claims – claims which he would have the burden of proving at an evidentiary hearing – this Court finds that summary judgment is appropriate. Applicant's motion to reconsider is therefore denied.

II. Irregularities in the Indictment

Applicant next argued that he was denied due process of law under both his federal and state constitutional and statutory rights where the state did not obtain a lawful true bill indictment. Specifically, Applicant alleged that his indictment was deficient because the grand jury convened outside a term of general sessions.

On June 28, 2007, then Chief Justice Jean Hoefer Toal issued an order outlining the authority of judges designated as a chief judge for administrative judge in circuit court. That order indicates in paragraph nine (9) that the chief judge for administrative purposes may convene the grand jury at times other than during a term of general sessions.¹⁰

To the extent Applicant argues in his post-hearing motion that the order took place before his conviction, this Court finds he is mistaken as to the date the order was issued. To the extent

⁹ As this state's Supreme Court has pointed out, in the years since the United States Supreme Court decided Pearce, it has interpreted and restricted the rule several times. State v. Hilton, 291 S.C. 276, 277-78, 353 S.E.2d 282, 284 (1987).

¹⁰ This Order has been amended a number of times since its initial filing, most recently on February 4, 2011. None of the amendments have altered the underlying provision at issue in this case.

Applicant argues the administrative order is contrary to the laws of this State, this Court finds summary judgment appropriate, and supported by the Supreme Court's Order. A finding by this Court that the Supreme Court issued its order in error would be inappropriate in light of the structure of our judicial system. See American Fast Print, Ltd. v. Design Prints of Hickory, 288 S.C. 46, 47, 339 S.E.2d 516, 517 (Ct. App. 1986) ("The Supreme Court may want to grant certiorari in the instant case and modify or overrule its previous decision, but this court has no authority to change it"); see also Bain v. Self Memorial Hospital, 281 S.C. 138, 141, 314 S.E.2d 603, 605 (Ct. App. 1984) ("Where the law has been recently addressed by our Supreme Court and is unmistakably clear, this court has no authority to change it"). Accordingly, summary judgment is warranted on this issue, and Applicant's motion to reconsider is denied.

[Signature Follows]

CONCLUSION

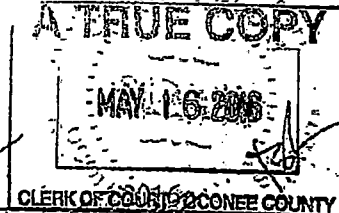
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. Further, Applicant's motion to reconsider this Court's grant of partial summary judgment is denied.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

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

AND IT IS SO ORDERED this 10 day of May



BROOKS P. GOLDSMITH
Presiding Judge
Tenth Judicial Circuit

_____, South Carolina

FILED OCOONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2016 MAY 16 P 4:37

FILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2016 MAY 26 P 3:10

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS

COUNTY OF OCONEE)

C/A NO. 2013-CP-37-0272

JAMES Tinsley, #171943,)

2014-CP-37-0737

Applicant,)

VS.)

APPLICANTS MOTION TO

STATE OF South Carolina,)

ALTER OR AMEND

Respondent.)

COMES NOW, the ABOVE Applicant, with his motion to ALTER OR Amend this courts order denying post-conviction relief, Pursuant to Rule 59(e) OF the South Carolina Rules OF Civil Procedure.

This COURT Filed its order OF Dismissal on May 16, 2016 and received by Applicant on May 19, 2016. The order failed to address all OF the issues Raised by Applicant and was based on unreasonable and unsupported findings OF FACT OR misapplication OF the governing law. Barley v. State, 392 S.C. 422, 709 S.E.2d 671, 676 (2011) (PER Judges findings must be supported by evidence OF probative value and may not be controlled by an error OF law).

ENTERED

Copies to:

Atty. (P) ☒

DSS ☒

Mailed ☒

other ☒

Mr. Tinsley ☒

handed ☒

COMPUTER

①

This COURT'S decision is very troubling and IT appears this COURT Failed to give this case the attention IT deserves, For ITS Findings are completely false and unsupported by any evidence, For instance, this COURT'S order contends that "Applicants' plea counsel also testified." (order of dismissal, page 2) and that the COURT considered the CLERK OF COURTS records "regarding the subject guilty plea." (Id. at page 3). This case did not even involve a guilty plea but dealt with a jury trial in which Applicant represented himself. NO counsel testified during the evidentiary hearing.

I. Ineffective assistance of counsel on Appeal.

It appears these False claims were made to support a subsequent finding that appellate counsel made a "professional decision" to exclude additional issues on appeal. (Id. at page 4). But these findings are not supported by any evidence because the appellate attorney did not testify during the evidentiary hearing nor did he file an affidavit in opposition to Applicants Summary Judgment Motion claiming to have made a professional judgment or decision. Wilds v. South Carolina, 2008 WL 9735687 # 7 (May 14, 2008) (Inasmuch as the Respondent presented no testimony from appellate counsel, there is no evidence that the decision not to present this issue on appeal was a professional one). This lack of evidence should have prevented this COURT FROM finding that Appellate counsel acted pursuant to a professional

decision because there is no evidence in the record to support this finding. Wilds v. State, 407 S.C. 432, 756 S.E.2d 387, 391 (2014) (state presented no evidence indicating counsel made a tactical decision not to appeal this issue); see also: Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998) (conclusory allegations, conjecture and speculation are insufficient to overcome moving party's summary judgment motion). Simply put, the arguments presented by counsel for the respondents are not evidence. Barcamerica Intern. USA Trust v. Tyfield Importers, Inc., 289 F.3d 589 (2002).

The Failure to Raise Applicants Remaining Issues on appeal, fail to meet objective standards of reasonableness. Lounds v. State, 670 S.E.2d 646, 650 (2008) (Professional decisions are still subject to scrutiny and must also be objectively reasonable); Wilds, supra, at # 7 (same).

This is particularly true when the only issue raised on appeal was fatally flawed because a dispute in the evidence justified denying directed verdict of acquittal and submitting the disputed question to the jury. Applicant contends this court has made an error because his other issues are stronger than the issue that was raised and would have resulted in a reversal had they been raised on appeal. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

(a) Failure to submit question of whether Applicant was a "thief" or a "receiver" to the jury with appropriate instructions.

This court has erred in finding that this issue was not properly preserved and therefore no ineffective assistance of counsel occurred. Applicant agrees that in order to preserve a jury charge, it must be raised and ruled upon by the trial judge. Whipple v. State, 324 S.C. 43, 476 S.E.2d 683 (1996). Moreover, a written proposed request for jury charges is not sufficient to preserve the issue for appeal "if" the trial judge never makes a decision to deny the requested charges. State v. Johnson, 333 S.C. 62, 64 FNI, 508 S.E.2d 29, 30 FNI (1998).

Unlike Whipple, here applicant submitted a written request for jury charges, (Appendix to Summary Judgment, page 397) and obtained a ruling in which the trial judge refused to give the requested charge. (TR. Trans. page 333, lines 14-16). Moreover, the trial judge was simply adopting his previous ruling in which he denied directed verdict because he believed a "thief" could still be convicted of "possessing" stolen goods. (TR. Trans. page 264, lines 21 - page 265, line 4). Because the trial judge believed there was no distinction between being a "thief" or a "receiver",

he refused to submit that question to the jury because he believed IT was a legal question FOR THE COURT. (TR. TRANS., page 334, lines 1-9).

All that this State has ever required is that the question must have been fairly raised in the lower court and passed upon by the COURT. State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (quoting Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939)).

To Fino Applicant's argument was unpreserved, rather than an "augmentation" of the prior discussions, would result in an unjust and hypertechnical application of the State's error preservation Rules. See: Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing "concerns about a hypertechnical application of a procedural bar to appellate arguments"); see also Id., at 332-33, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part) ("An over-zealous application of appellate preservation Rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this State by settling disputes and promoting justice. . . I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with an attorney by showcasing

their alleged mistakes... [particularly because] behind every party name on a Caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests").

Since Applicant did reavest the jury charges in writing and did obtain a Ruling on his requested jury charges, this COURT has erred in its application of the governing law, because this issue was preserved for appeal. Moreover, whether Applicant was a "thief" or a "Receiver" was not a legal question but a Factual question to be decided by the jury. Carrazos v. Smith, 132 S.Ct. 2, 4 (2011) ("it is the responsibility of the jury - not the court - to decide what conclusions should be drawn from the evidence admitted at trial"). When there is a dispute in the evidence, the question should be submitted to the jury with proper instructions from the court. Posey v. State, 156 S.E.2d 340, 341 (1967) (Judge properly submitted question of what County crime occurred in to the jury with proper instructions from the court).

In connection, it is Reversible error to Refuse to give a charge that is supported by the evidence. State v. Hill, 433 S.E.2d 848, 849 (1993). Likewise, if the COURT has previously held it Reversible error to Refuse to give a charge, it is inherently prejudicial not to have Raised the issue on appeal because it would have resulted in a reversal.

OF the conviction so as to constitute ineffective assistance OF appellate counsel. Southerland v. State, 524 S.E.2d 833, 836 (1999). For these reasons, this COURT should Alter its previous decision and grant Applicant Relief on this issue.

(b) Applicant was denied due process OF law where there was a material variance between the States' evidence and the allegations in the indictment.

The COURT'S order denying post-conviction relief Failed to address this issue. PRUITT v. State, — S.C. —, 423 S.E.2d 127, 128 (1992) (In order to preserve PCR issues FOR certiorari review, an applicant must file a Rule 59(c) motion to address any issues overlooked by the PCR COURT). Moreover, the State failed to dispute this issue or present any arguments demonstrating that Applicant was not entitled to relief in his FAVOR.

This issue was preserved because Applicant moved for directed verdict OF acquittal and requested that the charges be dismissed due to a variance in the evidence, (Tr. Trans. page 258, lines 11-14). Applicant also pointed to case law that a material variance between the charge and proof entitled him to directed verdict. Applicant pointed out that the proof was that he was a "thief", but that he was charged with "possession". (Id. at page 339, line 15-

340, line 14).

Applicant was indicted for receiving stolen goods and possessing stolen vehicles, which requires proof that he "received the goods from someone else who stole them," State v. McNeil, 445 S.E.2d 461, 462 (1994); State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 FN1 (2009). The States theory of prosecution was that applicant has stolen the goods himself. This is substantially different than the facts contained in the indictment that was presented to the grand jury who indicted applicant. Applicant was essentially convicted of larceny, an unindicted offense.

Applicant contends this act of convicting him under a different theory than that alleged in the indictment, amounted to a "fatal variance" or "constructive amendment" that deprived him of due process of law. Bailey v. State, 392 S.C. 422, 709 S.E.2d 671, 677 (2011); United States v. Mason, 41 Fed. App. 612 (4th Cir. S.C. 2002) (when the governments arguments and evidence broadens the basis for a conviction beyond those in the indictment, it constitutes a constructive amendment or fatal variance which violates the right to be indicted by a grand jury).

This tactic also prevented Applicant from having true notice of the charges and what he must be prepared to defend against at trial. Applicant believed he would have to defend himself against a claim that he "received the

goods from someone else who stole them", but ended up being surprised when he found himself defending against a claim that he actually "stole the goods himself". Applicant maintains this denied his Constitutional Rights and that he is entitled to relief in his favor because the state has failed to offer any evidence, either through testimony during the PCR hearing, or in an affidavit in opposition to Applicant's Summary Judgment motion, that applicant is not entitled to relief under the governing law. Clearly it would be ineffective assistance of appellate counsel not to raise this issue that was preserved and was stronger than the issue that was raised, because this State has repeatedly held that an improper modification of charges is reversible error.

For these reasons, Applicant believes that this COURT should amend its previous order and grant Applicant post-conviction relief on this undisputed issue.

(c) Applicant was denied due process when the Trial Judge refused to grant a continuance or otherwise provide funds for an expert handwriting analysis to dispute the state's surprise evidence.

This COURT has made the same error that the trial COURT made by finding that Applicant's request for funds

was untimely because Applicant did not file his request "until a mere ten days before his trial". (PCR order pages 6-7). In other words, there is no evidence in the record to support this finding because the fact that Applicant filed his request just prior to trial is not a controlling factor. What is a controlling factor is the fact that the state caused the Applicant to be unable to seek funds sooner, because the state did not provide the surprise bill of sales in their initial discovery.

Rule 5(a)(3) of the South Carolina Rules of Criminal Procedure require the state to provide discovery within thirty (30) days. Applicant received discovery on April 3, 2008 (Appendix to Summary Judgment, page 478), however, the disclosure did not contain any alleged bill of sales. On July 7, 2008, less than a month prior to trial, the alleged bill of sales magically appear and are provided to applicant in a supplemental disclosure. (*Id.* at page 480-490). Applicant immediately filed a motion for a continuance and for funds for an expert to demonstrate that the bill of sales did not contain his handwriting or signature and that the possibility exists that the bill of sales were fabricated by police in response to a lawsuit applicant had filed against them. Police fabrication would be one reasonable inference for why the bill of sales did not exist back at the time of the initial disclosure.

Moreover, the court has made a big deal out of the fact that the motions were not heard prior to trial. The Solicitors Office is responsible for scheduling motions for hearings. The State did not schedule these motions for a hearing prior to trial because they were trying to gain an unfair factual advantage by being able to present evidence without applicant being able to introduce contradicting expert testimony.

These facts are not in dispute and this behavior denied applicant a fair opportunity to defend himself against the states accusations. The states interference prevented applicant from seeking funds sooner and therefore any timeliness issues must be imputed to the state. For these reasons, applicant believes that this court should amend its previous order and grant applicant relief on this undisputed issue.

II. Applicant was denied his Fourteenth Amendment AND FARETTA Rights when the court failed to provide applicant with any resources to prepare for trial.

This courts order failed to address this issue under the correct principals of law or claimed rights violation. The court attempted to characterize this claim as one challenging the denial of a right to an advisory counsel under the "Sixth" Amendment, rather than a denial of a

Right to Resources to prepare for trial under the "fourteenth" Amendment.

Applicant contends that even though he wished to represent himself, he did not waive the concomitant right to have access to materials for pretrial preparations. Applicant maintains that when a defendant wishes to represent himself under Faretta v. California, 422 U.S. 806 (1975), the court must provide resources to prepare for trial to ensure that the defendant's ability to represent himself is meaningful and not simply an empty formality. SEE: Milton v. Morris, 767 F.2d 1443, 1446 (1985) (An incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense).

The Fourth Circuit Court of Appeals seem to recognize that defendants must be provided with resources to prepare for trial, but that they cannot dictate which methods the courts utilize. United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978) (Quoting United States v. West, 557 F.2d 151 (1997)). Applicant never tried to dictate the method used, but was willing to use "stand-by" counsel to conduct research and report those findings to Applicant because it is the most common method utilized by the courts. West, supra. What is missed by this court is Applicant's claim is solid because he was not offered

"any" method of preparing for trial. Applicant was not offered direct access to law books or any alternative method of interviewing potential witnesses and he was not given the services of "stand-by" counsel in a pre-trial matter to interview witnesses or conduct legal research on Applicant behalf.

This COURT attempts to by pass this "Fourteenth" Amendment and Faretta claim by characterizing it as a "Sixth" Amendment claim to a right to an advisory counsel. United States v. Lawrence, 161 F.3d 250 (1998) (holding no "Sixth" Amendment right to an advisory counsel). This COURT has made a fatal flaw because it has falsely concluded that the type of pretrial legal research assistance Applicant sought would have constituted "hybrid representation" or a "special appearance by counsel". (PCR order, page 9). The type of pretrial assistance sought by Applicant does not constitute "hybrid representation", nor did Applicant wish to have counsel "represent" him or make any "special appearances" during the trial.

What is missed by the COURT, is regardless of whether the trial COURT had discretion to refuse stand-by counsel as a pretrial aid for purposes of conducting trial preparations, the COURT nevertheless denied Applicants due process rights under the Fourteenth Amendment because the COURT failed to provide any other alternative methods for preparing

FOR TRIAL.

Right or wrong, LAWRENCE only stands for the position that there is no "Sixth" Amendment right to an advisory counsel during trial. In other words, there is no right to have counsel make any special appearances "during" the trial that might be construed as "representing" the defendant or as "hybrid representation"; LAWRENCE did not overrule Chatman, supra, nor stand for the proposition that a defendant wishing to represent himself has no Fourteenth Amendment right to resources to make his Faretta rights meaningful. Nor does LAWRENCE stand for the position that stand-by counsel is not an adequate method of providing pre-trial legal research resources to prepare for trial when Chatman held it to be an adequate method.

Moreover, LAWRENCE did not consider whether a state's Constitution or State Supreme Court case law might create additional rights beyond those found in the "Sixth" Amendment to the Federal Constitution. SEE: e.g., State v. Sanders, 237 S.E.2d 53, 54 (1977) (A defendant is entitled to stand-by counsel even if he represents himself); State v. Reed, 503 S.E.2d 747, 751 (1998) (A defendant may utilize the assistance of stand-by counsel [as opposed to hybrid representation] to the extent he so desires).

For the reasons shown herein, this Court should alter its previous order and address this claim under the "Fourteenth"

Amendment FOR the COURTS denial OF "all" FORMS OF ACCESS to "any" method OF preparing FOR trial. Applicant is entitled to RELIEF in his FAVOR under the non-disputed Facts OF this CASE which prove that Applicants Federal and State Constitutional Rights were violated when his Faretha Rights were rendered meaningless due to his inability to prepare FOR trial.

III. APPLICANT WAS DENIED HIS SIXTH AMENDMENT
RIGHT TO COUNSEL WHERE HE DID NOT KNOWINGLY,
INTELLIGENTLY OR VOLUNTARILY WAIVE COUNSEL.

THIS COURTS ORDER DENIED RELIEF ON THE BASIS THAT Applicant "Voluntarily" waived counsel, and based on applicants knowledge OF the legal system, he must have made an informed choice to proceed pro se with his "eyes open." (PCR order, page 10).

IF Applicant were claiming that he did not know he had a right to counsel, or that he did not recognize the dangers OF SELF Representations - such as the waiver OF the right to remain silent - the COURT would be correct. Here, however, that is not the question. The question is whether Applicant chose to Represent himself because he had a detrimental Reliance on a belief that IF he Represented himself, the COURT would provide him with some method OF interviewing witnesses and conducting

legal research in preparation for trial.

Applicants knowledge of the legal system actually works in his favor in this matter because clearly someone with Applicants knowledge would have known that he had a Fourteenth Amendment right to be provided with resources to prepare his defense. Milton, supra. And while applicant understood that he could not dictate the methods utilized by the courts, Chattman, supra, he fully expected that some method would be provided. Applicant even relied upon our state Supreme Court authority for the belief that he had a "right" to stand-by counsel, even if he represented himself, Sanders, supra, and that he could utilize that assistance "to the extent he so desired" as long as he did not attempt to change the status of counsel into one who "represents" applicant. Reed, supra.

Applicants affidavits and testimony clearly indicate that applicant relied upon his belief that he would be provided with some method of preparing for his defense, and that he would not have attempted to exercise his Faretta rights, had he been told the court would not provide any other means of preparing for his defense.

What is important here, is that the judge nor anyone else, ever warned applicant that he would be denied all forms of preparing for trial if he chose to represent himself. Since applicant had a reasonable belief that

he would be provided with some form of research ability, even if he represented himself, he could not have waived his right to counsel with his "eyes open" because his basic ability to prepare for trial was not met.

When applicant realized the court was not going to provide any alternative method of preparing for trial, he took steps to negate this impediment. He filed additional motions and continued to object to being forced to stand trial without the ability to conduct legal research, interview witnesses or to subpoena them. Applicant's motions and objections should have placed the court on notice that Applicant's waiver of counsel was not knowingly and intelligently given, because it rested on a condition that applicant be given stand-by counsel or some other method of conducting legal research. State v. Bateman, 296 S.C. 367, 373 S.E.2d 470, 471 (1988) (Trial Judge has responsibility to ensure waiver was intelligently given).

Here, the most important factor is the defendant's "understanding" of what would happen if he chose to exercise his Faretta rights. Graves v. State, 422 S.E.2d 125 (1992). It is undisputed, that Applicant's understanding of what would happen if he represented himself, would result in his being provided with some means of preparing for trial due to his incarceration. The fact that that did not happen, renders his waiver of counsel invalid as being unknowingly and unintelligently given.

The position given by this court in its order is not

based on any sound principal of law and is unsupported by the undisputed facts of this case. To be sure, Applicant points out that there is absolutely no evidence in the record to support this court's findings. THERE is absolutely no evidence applicant was ever warned or had an independent knowledge or belief that he could be forced to stand trial without any resources to prepare for his defense. Any such warning or belief would be contrary to law and it is therefore unrealistic for this court to base its previous decision on a finding that Applicant should have known about, and relied upon, a belief that is not supported by any reasonable legal principal.

For these reasons, this court should reconsider its previous decision and grant Applicant relief in his favor.

IV. Applicant was denied due process of law
by the prosecutors misconduct in failing
to:

- (a) Provide Brady materials to defense concerning
a deal made with co-defendant for probation
and other benefits in exchange for testimony
implicating applicant.

This court denied relief on this ground because it believed the suppressed evidence was not material to

to guilt or punishment and that there is no reasonable probability that the outcome would have been different had the evidence been disclosed. (PCR order, page 13). In support of this belief, the court suggests that the jury heard testimony that there was a "recommendation of a probationary sentence" and even after considering that possible motivation for testifying, the jury still convicted Applicant.

The court misses the point. The jury was lied to about the possibility of probation and was told that it was only a recommendation that could be "accepted or rejected" by the court. (Tr. Trans. page 234, line 18 - page 235, line 14; page 248, lines 4-10; and page 353, lines 12-16). This misled the jury concerning the strength of a possible motivation for Justice's testimony. A jury has the right to hear of any possible interests a witness may have that might motivate him to testify falsely, Napue v. Illinois, 360 U.S. 264, 269 (1959), including any deals made in exchange for his testimony. Giglio v. United States, 405 U.S. 150 (1972). Such evidence is material to guilt or punishment because it can be used for impeachment purposes. Kyles v. Whitley, 514 U.S. 419 (1995); Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70, 73 (2006).

During the trial the judge, solicitor and Mr. Justice misled the jury by informing them that there was no deal and that the court could "accept or reject" any recommendations. These statements, along with the false

Claims that Justice would still face prosecutions in other jurisdictions, could have mislead the jury's estimate of Mr. Justice's truthfulness and credibility, by falsely leading the jury to believe Justice was testifying against, rather than in aid of, his own penal interests.

At the time Mr. Justice testified in Applicant's trial, Justice had already plead guilty. The court had already accepted the plea agreement to probation and had agreed to give him probation if Justice would testify against Applicant. (Appendix to Summary Judgment, page 417, line 23 - page 418, line 3). Once the court accepted Justice's plea agreement, it was bound to uphold its end of the bargain, Clark v. Stark, 321 S.C. 377, 468 S.E.2d 653 (1996), and may not reject Justice's probationary agreement once he had "performed" by testifying against Applicant. Reed v. Becka, — S.C. —, 511 S.E.2d 396, 402-03 (1999).

although Justice testified falsely at trial that there was no deal to probation, he admitted during the PCR hearing that there was a deal to probation and that the court would not reject the deal if he testified against Applicant.

Direct examination of Hugh Justice

Q. was that a negotiated plea agreement, was that your motivation for pleading guilty? would you have plead

guilty IF IT could had just been an open plea and you could have got the maximum sentence, or did you rely on that deal?

- A. I -- I Relied on the communication with my Counsellor; And -- and the -- I mean, IT was my understanding IT was going to be a *quid pro quo*, Probation For my testimony. (PCR Trans. page 95, lines 6-14)... I knew that IF I got up and testified, ... that they were going to honor what we discussed. (Id. at page 99, lines 1-4).

Here the truth impugned the veracity of the states' key witness and demonstrated that the jury was misled by Justice, the COURT and Solicitor when it came to the strength of the motivations for Justice's testimony. Cambell v. Reed, 594 F.2d 4, 8 (4th Cir. 1979). Even though Applicant attempted to argue that Justice was implicating Applicant because he was receiving things of value in exchange for his testimony, everyone in the room was misleading the jury and suggesting that Applicants arguments were nothing more than conjecture. Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976).

This COURT has made a serious error of law by holding Applicant to a standard that he must prove "the result of

the proceedings would have been different." Here, "IT is not whether applicant would more likely have been acquitted had the evidence been disclosed," but whether, without this impeachment evidence that there was a deal to probation that could not be rejected, applicant received a fair trial "resulting in a verdict worthy of confidence." Riddle, supra, at 73. Applicant contends that he did not receive a fair trial resulting in a verdict worthy of confidence because the jury was misled concerning possible motivations that could have affected their assessment of Justices' truthfulness, reliability and credibility.

For these reasons, Applicant believes this court should amend its order to grant Applicant relief on this issue that is undisputed by any contradicting evidence.

- (b) Failure to correct false testimony when it occurred and solicitors' false statements that created a false impression of Justices' reasons for testifying.

In addition to not being told the truth about the deal to probation, the jury was likewise misled concerning other benefits Justice had received in exchange for his testimony. The jury was lead to believe Justice was testifying against, rather than in aid of, his own penal interests and that Justices' truthfulness and

Reliability should be given great weight based upon that factor.

The truth however is that by pleading guilty and testifying against applicant, Justice had five (5) other Felony charges dismissed. Justice was also allowed to plead guilty to thefts in Oconee County that actually took place in other jurisdictions and this benefited Justice greatly because it prevented further prosecution in other Counties under double jeopardy. In other words, Justice's testimony and plea deal was in aid of, rather than against his penal interests and had the jury not been lied to or manipulated concerning these factors, they may not have found Justice to be truthful or credible.

This issue was not even addressed by the court in its order. The solicitor knew Justice had entered an agreement to probation in exchange for his testimony that could not be rejected once Justice "performed". Nevertheless, the prosecutor allowed the false testimony and claims by the trial Judge to go uncorrected which created a false impression of Justice's motivation for testifying. A prosecutor's deliberate deception of a jury by the presentation of known false evidence is incompatible with the rudimentary demands of justice. Riddle, supra, at 75. The failure to correct the false evidence is as reprehensible as its presentation, Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996). This

is true regardless of whether the prosecutor solicited the false evidence or merely allowed it to go uncorrected. United States v. ARGURS, 427 U.S. 97 (1976); Napue, *supra*.

To make matters worse, the prosecutor then made false statements to the Jury himself, by bolstering the false claim that there was only a "recommendation that could be rejected by the COURT" and that Justices' testimony should be considered truthful because he was testifying against his own penal interests and would "face additional prosecutions in other countries." This was untrue. Justices' testimony and plea deal actually prevented further prosecution in other jurisdictions. The jury should have known the truth about the deals and benefits and been allowed to weigh those factors in determining Justices' motivations, truthfulness and credibility.

A conviction such as this one must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Simpson v. Moore, 627 S.E.2d 701 (2006). Here, there is a reasonable likelihood that the false statements, evidence and testimony could have affected the jury's assessment of Justices' truthfulness, reliability and credibility.

For these reasons, this court should alter its previous order and grant Applicant relief based upon the non-disputed facts of this case.

IV. APPLICANTS CONVICTION WAS OBTAINED BY THE
USE OF FALSE INFORMATION, TESTIMONY, AND
FABRICATED EVIDENCE THAT HAS NOT PREVIOUSLY
BEEN PRESENTED TO THE COURT, BUT REQUIRES
REVERSAL OF THE CONVICTION IN THE INTEREST
OF JUSTICE.

This COURT'S ORDER suggests that the False information utilized by the state "is such as will probably [NOT] change the result if a new trial is granted." (PCR order, page 14). Applicant disagrees, and as pointed out previously, "the use of False evidence to obtain a conviction violates due process" regardless of whether it was intentional or by oversight, Napue, supra, at 269. The deliberate deception of the jury by the presentation of False evidence is incompatible with Rudimentary demands of Justice Riddle, supra, at 75 and must be set aside if there is any reasonable likelihood that the False testimony could have affected the judgment of the jury, Simpson, supra.

Had the jury been told the truth that Justice was lying when he claimed Applicant was involved in the thefts, (Tr. Trans. page 261, lines 12-15; page 262, lines 4-6; and page 263, lines 10-11), and had they known that Detective Arnold would later give contradictory sworn testimony in a Federal deposition, (Arnold Depo., Appendix to Summary

Judgment, page 459, lines 19-25; page 463, lines 14 - page 465, line 2), that he did not investigate, take photos of the campsite or seize any bill of sales from the camper; the jury might have found Applicants claims that Justice was lying to obtain a lenient sentence and Arnold had fabricated the bill of sales himself to cause the Federal Civil suit against him to be dismissed, to have been much more believable. In other words, the false testimony could have affected the judgment of the jury. Simpson, supra.

Moreover, this court's claim that a four year delay caused Arnold's memory to be impacted is not supported by any evidence. Arnold did not testify nor provide any affidavit that he had memory problems due to the time between his trial testimony and his deposition. It is unlikely that Arnold would forget the details of a case as memorable as this one. This was probably the only time in Arnold's career in which he was sued in Federal Court. Arnold was a defendant in the Federal case prior to his in-court testimony and the Federal case remained active until his deposition testimony. Arnold was constantly giving affidavits and being questioned by his attorney concerning the details of his actions with regard to the Federal suit. It is not realistic to believe Arnold would just forget taking photos, conducting an investigation,

and discovering evidence in the camper of the bill of sales for which he had previously testified, unless his in-court testimony had been fabricated as applicant had always maintained.

Next, the court put great weight on the fact that Applicant did not object to the introduction of the Bill of sales and that this is somehow a controlling factor in this case. Applicant could not have objected on the basis that Arnold would give a different story under oath at some distant time in the future. This is why Applicant raised this issue as evidence that had not previously been considered by the court - and could not have previously been considered by the court - because Arnold had not yet given the conflicting sworn testimony. This evidence not previously considered requires the reversal of the conviction in the interest of Justice because applicants conviction was obtained by false testimony.

Finally, this court's decision rested on a belief that the result would not change because Mr. Justice's testimony constitutes substantial evidence that Applicant knew the items were stolen. This court has missed the fact that Applicant is also challenging Justice's very testimony that Applicant was involved in the thefts and that the solicitor knew Justice was giving false

testimony but allowed it to go uncorrected in front of the jury. Had the jury known the solicitor believed Justice was lying and that Arnold was lying about finding the bill of sales, it is reasonable to believe such false testimony would have affected the jury's decision.

For these reasons, Applicant believes this court should alter its previous decision and grant Applicant relief in his favor.

VI. Applicant was denied his State and Federal due Process and Equal Protection Rights where the state did not obtain a true Bill indictment through a lawful process.

This court previously granted the state summary judgment on this issue. Applicant sought reconsideration of that decision because he believed the court had overlooked a critical distinction between this case and others in which defendants are only claiming the court lacked subject matter jurisdiction.

In this court's order, it upheld its previous decision but again missed the controlling legal factors. Applicant maintains that he has a state statutory and state constitutional right to be indicted by a legally constituted grand jury which must convene during a term of General Sessions

Court and must be presided over by a general sessions Court Judge. (S.C. Code, § 14-9-210 and S.C. Const. Articles I, § 11 and V, § 22).

This Court suggests that on June 28, 2007, Chief Justice Jean Hooper Toal issued an order modifying the process by which Grand Jury indictments may be obtained. Accordingly, paragraph nine (9) authorizes grand juries to convene at times other than during a term of General Sessions, (PCR order, page 20).

This Court misses the point. In addition to state statutory or constitutional rights, applicant also has a "federally" protected right to equal protection of the laws, which requires the state to comply with its own statutory laws or procedures - whatever those procedures might be - in the operation of their grand juries. Rose v. Mitchell, 443 U.S. 545, 557 (1979) (Although there is no Federal Constitutional Right that states institute prosecutions by means of an indictment returned by a grand jury, states that do employ grand juries must comply with the commands of the Fourteenth Amendment equal protection clause in the operation of those juries).

What is missed by this Court, is even if Justice Toal's order authorizes a different process for conducting grand jury proceedings, the process authorized by Justice Toal's order was not followed. To comply with the order,

the Chief Administrative Judge must file an order of intent to conduct a grand jury proceeding outside a term of General Sessions Court, with the South Carolina Court Administration. This creates a record of the alternative method used and gives the defendant an opportunity to object to the process prior to the entry of a verdict by the jury pursuant to Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005). Additionally, the Chief Administrative Judge must preside over the alternative grand jury proceeding. Neither of these things occurred in this case and these failures to comply with Justice Toals' order or any other authorized process for grand juries, amounts to a "Federal Equal Protection" denial for failing to comply with the States own statutes, Constitution or acceptable "process" for the operation of grand juries. Rose, supra, at 557.

To make matters worse, the state prosecutor provided false information on the face of the indictment, when he claimed the indictment was obtained before a grand jury "during a term of General Sessions Court." This false information kept hidden from Applicant the fact that the indictment was obtained through an alternative process and constitutes cause for why Applicant did not object prior to the entry of the verdict. Strickler v. Greene, 527 U.S. 263 (1999) (IF STATE OFFICER led

defendant to believe that a violation had not occurred, cause is shown for why defendant did not object to the violation at trial).

The very purpose of a grand jury is not merely to investigate and accuse, but to "act as a curb on the unbridled power of the sovereign." State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In this case, because the grand jury was not presided over by a General Sessions Court Judge, the state was allowed to manipulate the grand jury and cause them to neglect their duty to put the allegations to any test. The grand jury simply acted as a rubber stamp. We know this because the court's own records establish that the grand jury true billed (230) indictments in four (4) hours which means they spent approximately one (1) minute on each indictment. This would be sufficient to sign each indictment, but would be insufficient to consider evidence, take testimony and vote on each indictment.

The method of indictment in this case did not comply with acceptable procedures and therefore amounts to a denial of a Federal Right to Equal Protection. For these reasons, Applicant believes this court should alter its decision and grant relief on this issue in Applicant's favor.

Based upon the foregoing arguments, Applicant believes this court's previous order denying PCR was based on erroneous findings of fact or misapplication of established principles. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1998) (The primary purpose of a Rule 59(e) motion is to permit the trial judge to "reconsider matters properly encompassed in a decision on the merits". Thus, it may be used when the order contains erroneous findings of fact or a clear misapplication of established legal principles). Applicant believes this court's decision is not based on any evidence of probative value, but rather, was based on unsupported conclusions and arguments made by counsel for which there is absolutely nothing in the record to support them. Bailey v. State, supra; Wilds v. State, supra.

VII. Summary Judgment

Finally, Applicant believes this court erred by failing to grant him Summary Judgment when there were no material facts in dispute and the state failed to produce their own affidavits or other evidence to create a dispute. Coker v. Cummings, 381 S.C. 45, 671 S.E.2d 383 (2008). An Applicant may move for Summary Judgment, with or without supporting affidavits. Rule 56(a), S.C. R. Civ. A.

But, when the applicant supports his summary judgment motion with affidavits, "an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue in dispute which prevents the entry of summary judgment, Id., at 388. The State did not provide any response or affidavit demonstrating that a dispute existed or that applicant was not entitled to judgment in his favor. Therefore, the court should have granted Applicant summary judgment on all issues. Id. SEE ALSO: Kerzer, supra, at 400 (conclusory allegations, conjecture and speculation are insufficient to overcome a moving party's summary judgment motion); Barcamerica, supra, (arguments presented by attorneys in their briefs are not evidence). Here, the court erred by accepting counsels verbal and written arguments as evidence when they were unsupported by any evidence. For these reasons, Applicant believes this court should alter its previous decision and grant Applicant judgment in his favor.

WHEREFORE, Premises considered, Applicant prays that this Honorable Court conduct a review of its previous decision and grant Applicant relief in an Amended PCR order.

Respectfully submitted,

May 20, 2016

~~S/ James Douglas Tinsley, Sr.~~

JAMES Tinsley, #171943

Livesay C.I. 3-23-C

P.O. Box 580

Una, S.C. 29378

CERTIFICATE OF SERVICE

I, JAMES Douglas Tinsley, Sr., hereby certify that I did cause the foregoing Motion to Alter or Amend to be served upon counsel of Record this 26th day of May, 2016, by placing a true and correct copy in the U.S. Mail, with proper postage affixed thereto, and addressed as follows:

Patrick L. Schmeckpeper
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2016 MAY 26 P 3:10

~~S/ James Douglas Tinsley, Sr.~~
JAMES DOUGLAS Tinsley, Sr.

(34)

ENTERED
COMPUTER

May 20, 2016

CLERK OF COURT
Oconee County
P.O. Box 678
Walhalla, S.C. 29691

JAMES Tinsley #171943
LIVESAY C.I. 3-23-C
P.O. Box 580
Una, SC 29378

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

2016 MAY 26 P 3:10

RE: Tinsley v. State; 2013-CP-37-0272
2014-CP-37-0737

DEAR CLERK:

Please find enclosed my motion to
Alter or Amend the Judges order of May 16, 2016
dismissing my PCR. PLEASE take notice that
I have been allowed to represent myself in
this action and that I did not receive the
Challenged order until May 19, 2016.

PLEASE take notice that I have ten (10) days
from the date of the "Receipt" of the order to
File my Rule 59 (e) motion and that because I
was served by mail and must respond by mail, I
have an extra five (5) days to complete this
act. S.C.R. Civ. P. 6(e).

Thanking You Before Hand,

James Douglas Tinsley

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

James Tinsley, #171943

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

2013-CP-37-0272¹

RETURN TO APPLICANT'S
MOTION TO ALTER OR AMEND

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2016 JUN 26 PM 4:10

In response to Applicant's Motion to Alter or Amend Order Pursuant to Rule 59(e), SCRCF, filed May 26, 2016, Respondent would show this Court:

I.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 4, 2013. An evidentiary hearing was convened on February 10, 2016, at the Anderson County Courthouse. The Applicant was present at the hearing and proceeded *pro se*. The Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. The Court denied relief by an order dated May 10, 2016, and filed May 16, 2016. Applicant subsequently filed a motion asking the Court to reconsider the findings of fact and conclusions of law contained in the order of dismissal.

II.

In his motion, Applicant asks this Court to reconsider its ruling. Respondent submits Applicant's motion to alter or amend should be denied. Applicant is asking the Court to reverse its decision and grant post-conviction relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998)

¹ Applicant also captioned his motion under the case number 2014-CP-37-0737. That case was dismissed by the Honorable J. Cordell Maddox by written order dated December 1, 2015, and filed December 10, 2015.



("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it").²

Respondent submits that this Court's Order of Dismissal contains the required findings of fact and conclusions of law on each remaining allegation as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a), SCRCP; see also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Accordingly, the Court properly ruled on all issues presented at the post-conviction relief hearing, and Applicant's motion should be denied.

[Signature follows]

² Applicant also points to scrivener's errors in the procedural history, which are more appropriately addressed under Rule 60(a), SCRCP.

III.

WHEREFORE, Respondent asks the Court to deny Applicant's motion for reconsideration. Respondent further asks the Court to strike those portions of the motion, including attachments, that attempt to introduce new information that was not timely presented at the evidentiary hearing.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

PATRICK L. SCHMECKPEPER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

June 16, 2016

STATE OF SOUTH CAROLINA)
 COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

James Tinsley, #171943,)

Case No. 2013-CP-37-0272

Applicant,)

v.)

ORDER

State of South Carolina,)

Respondent.)

FILED OCONEE COUNTY, SC
 BEVERLY H. WHITEFIELD
 CLERK OF COURT
 2016 JUL -1 P 12:35

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 4, 2013. An evidentiary hearing was convened on February 10, 2016, at the Anderson County Courthouse. The Applicant was present and proceeded *pro se*. The Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. The Court denied relief by an order dated May 10, 2016, and filed May 16, 2016. Applicant subsequently filed a motion on May 26, 2016, asking the Court to reconsider the findings of fact and conclusions of law contained in the order of dismissal. Respondent made its return to the motion, requesting this motion be denied.

[Signature follows]

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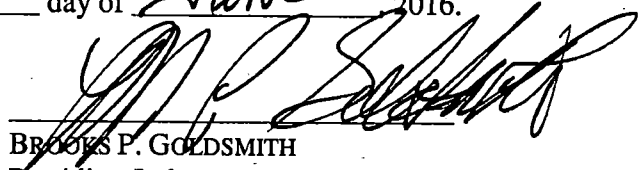
Atty _____ (P) _____ (D)
 DSS _____
 Mailed _____ Boxed _____ handed _____

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Based upon careful reconsideration of the evidence in this case, including Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend its judgment. This Court further finds oral argument would not aid in the reconsideration of the original judgment. The Order of Dismissal issued by this Court contains the required findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2016) and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion be denied and dismissed.

AND IT IS SO ORDERED this 21 day of June, 2016.


BROOKS P. GOLDSMITH
Presiding Judge
Tenth Judicial Circuit

2
_____, South Carolina

FILED OCONEE COUNTY, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2016 JUL - 1 P 12:35

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
 COUNTY OF OCONEE)
)
 C/A NO: 2013-CP-37-0272
 JAMES Tinsley, #171943)
 Applicant,)
 VS.) APPLICANTS REPLY
 STATE OF South Carolina,) BRIEF
 Respondent.)

FILED OCONEE COUNTY, SC
 BEVERLY H. WHITEFIELD
 CLERK OF COURT
 2016 JUN 27 A 11:56

On May 16, 2016, this court Filed an order denying post-conviction relief. Applicant Filed a motion to Alter or Amend because the courts order Failed to address all of the issues Raised by Applicant and/or the decision was not supported by any evidence in the record or was based on a misapplication of controlling case law. The Respondents have filed a Return which was Received by Applicant on June 24, 2016. This Reply Follows.

The Respondents seem to suggest that Rule 59(e) motions are not appropriate to Redirect the courts attention to Flaws in its decisions. Rule 59(e) motions are appropriate however to

①

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point out errors of law, OR where the decision is not supported by any evidence in the record. SEE: Bailey v. State, 709 S.E.2d 671, 676 (2011); Wilds v. State, 756 S.E.2d 387, 391 (2014) (since attorney did not testify, there was no evidence in the record to support PCR Judges findings that counsel made a tactical decision not to appeal issue).

It is also appropriate to file a Rule 59(e) motion when the PCR Judge fails to make findings of fact or conclusions of law on any issue raised during the PCR hearing. Pruitt v. State, 423 S.E.2d 127, 128 (1992).

Here, Applicant claimed it was ineffective assistance of counsel on appeal not to have raised the issue that applicant was denied due process of law where there was a material variance between the States' evidence and the allegations in the indictment.

This issue was raised and preserved at trial and was again presented and argued during the PCR hearing. No Ruling has been made on this issue from the PCR court.

Applicant contends that he was indicted for "receiving" stolen goods from someone else who stole them, but the evidence presented at trial suggested that Applicant was the thief.

This allowed applicant to be convicted of larceny - a crime he had never been indicted on and for which was never presented to a grand jury and convicting Applicant under a different theory than that alleged in the indictment amounted to a due process violation. Bailey v. State, 709 S.E.2d 671, 677 (2011)

Moreover, this COURT has failed to address Applicants FEDERAL DUE PROCESS CLAIMS by attempting to characterize his Faulty indictment issue as simply a "state" issue in which the South Carolina Supreme Court may alter or restrict and by suggesting that this COURT may not change Rulings of the Supreme Court.

This COURT has a duty and responsibility to protect Applicants FEDERAL Rights regardless of whether a single Justice of the State Supreme Court has chosen to overlook those Federal Rights.

Applicant respectfully requests that this COURT reconsider its previous decision and enter a new order granting the PCR.

June 24, 2016

Respectfully submitted,
of James Tinsley

James Tinsley

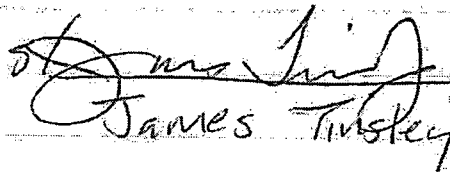
Greenville, S.C. 29611

CERTIFICATE OF SERVICEFILED OCONEE COUNTY, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2016 JUN 27 A 11:56

I, James Tinsley hereby certify that I did cause the Foregoing Reply Brief to be served upon counsel of record this 25th day of June, 2016, by placing a true and correct copy in the U.S. mail, with proper postage affixed thereto and addressed as follows:

Patrick L. SCHMECKPEPER
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211


James Tinsley

WITNESSES

OCSD/SMITH

[Signature]

ARREST WARRANT NO.

K226473

ACTION OF GRAND JURY

True Bill

MAY 27 2008

[Signature]
Foreman of Grand Jury

VERDICT

Guilty

[Signature] 7/31/08
Foreman of Petit Jury Date:

DOCKET NO.

2008-GS-37-

881

The State of South Carolina,

County of

OCONEE

COURT OF GENERAL SESSIONS

MAY 27 2008

TERM

2008

THE STATE

vs.

JAMES DOUGLAS TINSLEY

Indictment for

POSSESSION OF STOLEN VEHICLE
(MORE THAN \$5000)

16-21-0080(3)

[0430]

DAVID R. WAGNER, JR., DEPUTY SOLICITOR

2008 MAY 28 P 4: 57

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

[Signature]

735

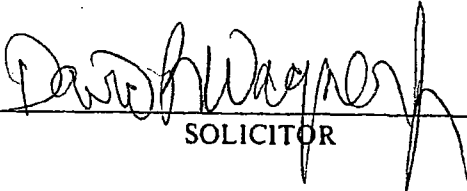
STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
POSSESSION OF STOLEN VEHICLE
(MORE THAN \$5000)
16-21-0080(3) [0430]

At a Court of General Sessions, convened on MAY 27 2008,
the Grand Jurors of OCONEE County present upon their oath:

THAT JAMES DOUGLAS TINSLEY DID IN OCONEE COUNTY ON OR BETWEEN JANUARY 13, 2008 AND JANUARY 25, 2008, RECEIVE, POSSESS, CONCEAL, SELL, OR DISPOSE OF A 2008 POLARIS RANGER 70, CAMO IN COLOR, VIN NUMBER 4X4RH65A184408423 AND A 2008 POLARIS RANGER 70, GREEN IN COLOR, VIN NUMBER 4X4WH65AX82381740 AND A TRAILER, BLACK IN COLOR MADE BY HORTON HAULER, VALUED AT MORE THAN FIVE THOUSAND DOLLARS, KNOWING THAT IT WAS STOLEN OR CONVERTED UNDER CIRCUMSTANCES CONSTITUTING A CRIME. ALL IN VIOLATION OF 16-21-80, CODE OF LAWS OF SOUTH CAROLINA, (1976), AS AMENDED.

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


SOLICITOR

WITNESSES

OCSD/SMITH

[Signature]

ARREST WARRANT NO.

K226540

ACTION OF GRAND JURY

True Bill

MAY 27 2008

Janet D. Bailey
Foreman of Grand Jury

VERDICT

Guilty

Bruce H. Arthur 7/31/08
Foreman of Petit Jury Date:

DOCKET NO. 2008-GS-37-

885

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

MAY 27 2008

TERM

2008

THE STATE

vs.

JAMES DOUGLAS TINSLEY

Indictment for

RECEIVING STOLEN GOODS
(MORE THAN \$5000)

16-13-180(3)

(514)

DAVID R. WAGNER, JR., DEPUTY SOLICITOR

2008 MAY 28 P 4:51

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

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STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR

RECEIVING STOLEN GOODS
(MORE THAN \$5000)

16-13-180(3)

(514)

At a Court of General Sessions, convened on MAY 27 2008,
the Grand Jurors of OCONEE County present upon their oath:

THAT JAMES DOUGLAS TINSLEY DID IN OCONEE COUNTY ON OR ABOUT JANUARY 29, 2008, RECEIVE OR POSSESS STOLEN GOODS, TO WIT: A 2003 DEERE BACKHOE TRACTOR AND A CARRY ON CARGO TRAILER, VALUED AT MORE THAN \$5000, AND THE SAID DEFENDANT KNEW OR HAD REASON TO BELIEVE SUCH GOODS HAD BEEN STOLEN.

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


SOLICITOR

WITNESSES
OCSD/SMITH

Da. l. 85

ARREST WARRANT NO. K226493

ACTION OF GRAND JURY

True Bill

MAY 27 2008

Janet D. Bailey
Foreman of Grand Jury

VERDICT

Guilty

Bruce H. Austin 7/31/08
Foreman of Petit Jury Date:

DOCKET NO. 2008-GS-37-**884**

The State of South Carolina,
OCONEE

County of _____

COURT OF GENERAL SESSIONS
MAY 27 2008 TERM 2008

THE STATE

vs.

JAMES DOUGLAS TINSLEY

Indictment for

RECEIVING STOLEN GOODS
(MORE THAN \$5000)

16-13-180(3)

(514)

DAVID R. WAGNER, JR., DEPUTY SOLICITOR

2008 MAY 28 P 4: 51

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

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740.

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
RECEIVING STOLEN GOODS
(MORE THAN \$5000)
16-13-180(3) (514)

At a Court of General Sessions, convened on MAY 27 2008,
the Grand Jurors of OCONEE County present upon their oath:

THAT JAMES DOUGLAS TINSLEY DID IN OCONEE COUNTY ON OR ABOUT JANUARY
22, 2008, RECEIVE OR POSSESS STOLEN GOODS, TO WIT: A 2008 KEYSTONE VR1
CAMPER WITH ALTERED VIN NUMBER AND TOOLS WITH KENWOOD RADIO AND
PROPERTY, VALUED AT MORE THAN \$5000, AND THE SAID DEFENDANT KNEW OR HAD
REASON TO BELIEVE SUCH GOODS HAD BEEN STOLEN.

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


SOLICITOR

WITNESSES
OCSD/SMITH

[Signature]

ARREST WARRANT NO. K226492

ACTION OF GRAND JURY

True B:11

MAY 27 2008

[Signature]
Foreman of Grand Jury

VERDICT

Guilty

[Signature] 7/31/08
Foreman of Petit Jury Date:

DOCKET NO. 2008-GS-37-883

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

MAY 27 2008

TERM 2008

THE STATE

vs.

JAMES DOUGLAS TINSLEY

Indictment for

RECEIVING STOLEN GOODS
(MORE THAN \$5000)

16-13-180(3)

(514)

DAVID R. WAGNER, JR., DEPUTY SOLICITOR

2008 MAY 28 P 4: 57

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

[Signature] 741

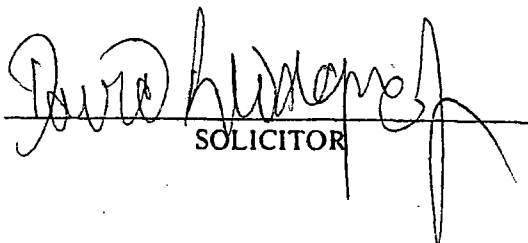
STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
RECEIVING STOLEN GOODS
(MORE THAN \$5000)
16-13-180(3) (514)

At a Court of General Sessions, convened on MAY 27 2008,
the Grand Jurors of OCONEE County present upon their oath:

THAT **JAMES DOUGLAS TINSLEY** DID IN OCONEE COUNTY ON OR ABOUT **JANUARY 22, 2008**, RECEIVE OR POSSESS STOLEN GOODS, TO WIT: A 2006 KAWASAKI, GREEN IN COLOR, VALUED AT MORE THAN \$5000, AND THE SAID DEFENDANT KNEW OR HAD REASON TO BELIEVE SUCH GOODS HAD BEEN STOLEN.

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


SOLICITOR

WITNESSES

OCSD/SMITH

[Signature]

ARREST WARRANT NO. K226489

ACTION OF GRAND JURY

True Bill

MAY 27 2008

[Signature]
Foreman of Grand Jury

VERDICT

Guilty

[Signature] 7/31/08
Foreman of Petit Jury Date:

DOCKET NO.

2008-GS-37-

882

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

MAY 27 2008

TERM

2008

THE STATE

vs.

JAMES DOUGLAS TINSLEY

Indictment for

RECEIVING STOLEN GOODS
(MORE THAN \$5000)

16-13-180(3)

(514)

DAVID P. WAGNER, JR., DEPUTY SOLICITOR

2008 MAY 28 P 4:51

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

[Signature]
743

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

INDICTMENT FOR

RECEIVING STOLEN GOODS

(MORE THAN \$5000)

16-13-180(3)

(514)

At a Court of General Sessions, convened on MAY 27 2008,the Grand Jurors of OCONEE County present upon their oath:

THAT JAMES DOUGLAS TINSLEY DID IN OCONEE COUNTY ON OR ABOUT JANUARY 22, 2008, RECEIVE OR POSSESS STOLEN GOODS, TO WIT: A POLARIS 4 WHEELER, POLARIS 6X6 SPORTSMAN 4 WHEELER, TWO TRAILER SUPERIOR, VALUED AT MORE THAN \$5000, AND THE SAID DEFENDANT KNEW OR HAD REASON TO BELIEVE SUCH GOODS HAD BEEN STOLEN.

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


SOLICITOR