ATTACHMENT B.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate Counsel Wanda H. Carter was ineffective in failing to raise ineffective assistance of trial counsel for failing to object when the state pushed to try the Appellant under an incorrect armed robbery statute. The indictment should have been quashed instead of amend, and trial counsel erred in not objecting to the judge improperly deleting from the indictments with his own pen. And amendment deprived trial court of subject matter jurisdiction.

Appellant contends that Appellate Counsel filed a frivolous brief on appeal, Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). Constitutional Law Key 250, 268.1(6) U.S.C.A. Const. Amends. 6,14,(Tr.p.1358-1370) in which Appellate Counsel Wanda H. Cater,-formerly, Wanda H. Haile at the time of Appellant's appeal- only gave a dry summary of the Appellant's case. Appellate Counsel failed to raise any [Arguable] issues in her brief on appeal.

In her petition to be relieved as counsel, pursuant to Anders v. California, supra, Appellate Counsel stated: "Counsel has thoroughly reviewed Appellant's lower court record in an effort to discover all arguable errors for presentation to the court on Appellant's behalf. In Counsel's opinion, the record fails to demonstrate either preserved errors or other legally substantial issues, to present to the Court within the context of this direct appeal."

However, transcript of trial proceeding and facts contained therein will confirm that, several arguable issues and other legally substantial issues were preserved for appellate review (Tr.p.10—p.44; p.1191 line 20-p.1207 line 6; and p.1343 line 23-p.1344 line 23; For Motions, Objections, Directed Verdict Motions, and several Motions for Quash Indictments).

Among that group of quashed motions, was the Petitioner's current allegation. And on this claim Appellant contends that Appellate Counsel Carter, was ineffective in failing to raise that trial counsel was ineffective for failing to object when the state pushed to try the Appellant under the new armed robbery statute, because where under the old statute, a main element is that the suspect

had to actually be armed (S.C. Code Ann. §16-11-330(1) (1976)) and the offense predated the new statute (S.C. Code Ann. §16-11-330(A) (Supp. 1999). The indict-objecting to the judge improperly deleting from the indictments.

At trial counsel argued, "When this offense was committed May 29, 1996, it was under the old armed robbery statute, that essentially the suspect had to actually be armed. Well, under the new version of the statute, the state gets the choice. The suspect is actually armed - as it must be, in order for him to be guilty of this offense - or alleges to be armed. (See Tr.p.104 line 16-p.lll line 16). The new statute did not apply at the time of the offense occurred.

Appellant asserts it is clear, that the state wanted to proceed under the new statute, because there was no gun (pistol) entered into evidence, no shell casings, no report mentioning any type of, "bullet holes," in anything or anyone, thus, the state had no way to prove that the suspect was actually armed, as required by the old statute. Leaving the State to rely solely on words to try and prove that the suspect was actually armed.

Words alone are not sufficient to establish that an offender was armed with a deadly weapon for purpose of the armed robbery statute Code 1976, §l6-ll-330(A).

Under the general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the* statutes operation.

Courts are bound to construe a penal statute strictly against the State and in favor of the defendant. See, State v. Muldrow, 559 S.E.2d 847(S.C.2002).

This issue was raised during pre-trial motions (App.p.104 line 16-p.lll line 18). And after defense counsels argued the motion the State moved to amend the indictments and specifically stated:

Court: So, I'll deny the motion to quash, the indictment, allow the amendment to delete the language "or while alleging." And I will do that in each of the four indictments if nobody objects.

You're not conceding to it, but if nobody objects to my deleting them in my own pen, does anybody have a problem with that?

Mr. Sneed: No, Sir.

Mr. Shupper: No, Your Honor.

Appellant argues that, knowing it would be incorrect for the State to proceed forward in its attempt to try Appellant under the language of the[1.] new statute, the trial judge attempted to correct this issue by "subtly" advising the state to move to amend the indictments. Which the state does move to amend and the court allows the amendment (See, App.p.107 line 21-p.108 line 10, and p.111 lines 2—16 specifically p.107 line 25-p.108 line 2 about the advising portion), by removing the language "or while alleging, either by action or words that he was armed while using a representation of a deadly weapon on the object which the person present during the commission of the robbery reasonably believe to be a deadly weapon." The trial judge deletes them in his own pen, and denies the motion to quash the indictment.

Appellant contends that trial counsel was ineffective in failing to object to the judge deleting the indictments in his own pen because (1) it is the sole [duty] of the grand jury to pass on and indictment or not. The presentment requirement of the Grand Jury are that they have to pass on all the elements of the offense and then there is the other requirement that an indictment should be in substantially the same language. And no one, not the court, the state, or defense counsel, knew for certain [which portion] the Grand Jury passed on in returning these indictments, whether he was actually armed, as it must be, in order for the Appellant to be guilty of the offenses, or it may have been presented to them while armed with a representation of a deadly weapon, and if they indicted him based on that kind of information, that would be inappropriate and incorrect;(2) by allowing the judge to delete them in his own pen, somehow resulted in serious "non-deleted" error, because the indictment still read out completely, the erroneous "or while alleging" language remains.

[1. See Page 12 For Footnote.]

However, if this court would review the indictments (see "original" Transcript Record on Appeal - pages 1380, 1381, 1362 and 1363) they would show that the, "or while alleging..." language has not been deleted. And although, there are "additional" indictments on page 1393 and 1395 that have been deleted, we don't know for certain which "set" of indictments were presented to the jury at trial in their deliberations.

And the Appellant contends, that since the indictments are preserved in record, "unamended," it's highly likely that the jury viewed the defective indictments during their deliberation.

And (3) the amendment was material change in the nature of the offense charged, because the proof required for amended indictment (S.C. Code Ann. §16-11-330(1)) was different from proof required for original indictment (S.C. Code Ann. §16- 11- 330(A).) (Supp.1999). Thus, The Appellant contends, the amendment to the indictments deprived the trial court of subject matter jurisdiction over the armed robbery charges.

Now, on Appellant's first (1) point; that it is the sole duty of the grand jury to pass on an indictment or not. It is clear that the incorrect armed robbery statute (S.C. Code §16-11-330(A)) was presented to the grand jury, and as trial counsel pointed out; "That's the essence of my objection, your honor, is that we don't know if the grand jury truly did pass on the elements of this offense [because] of the "or" language. Certainly it's not in substantially the same language as the (current) statute. The indictment is deficient in that sense." (App.109 lines 14-18; p.104 line 22-p.105 line6.) And trial judge agree that trial counsel had a valid point (App.106 lines 1-12 and p.107 lines 18-20).

Now, the State argued that it's understanding of the purpose of the indictment is, "to provide sufficient notice to the defense to be prepared. They were served with arrest warrants indicating that they were charged with armed robbery. And the form of the indictment provides sufficient notice > to the defendant and defense attorneys as to what he is charged with." However, Appellant argues that during the nearly three years that Appellant was held in the county jail awaiting trial,

(App.p.44 lines 8-9) the State told Appellant and his counsel that he was being charged under Code 16-11-330(A). But at the outset of trial the State moved to amend the indictment, and now try the Appellant under a different armed robbery Code, 16- 11-330(1), which was a different material change in the nature of the offense charged, that has a different aggravating circumstance, thus, misleading the Appellant as to what he was called upon to answer. (See, State v. Guthrie, 572 S.E.2d 309 (S.C.2002) (Trial court erred in allowing the State to amend defendant's burglary indictment at trial by adding the additional aggravating factor of two or more prior burglary convictions; amendment was material change in the nature of the offense charged because the proof required for amended indictment was different proof required for original indictment. Code, §16-11-311(A) and S.C. Code Ann. §17-19-100<1985)).

Furthermore, the trial judge does admit to having doubt, a question in his mind, as to whether the grand jury truly passed on the indictments or not, stating: "There is a question in my mind as to whether or not the ... as to what the grand jury may have passed upon." But then the trial judge turns around and attempts to second-guess or speculate as to what the grand jury's verdict was, stating: "but it seems virtually irrefutable that they had to pass upon this matter, that the defendants were armed, actually armed with a deadly weapon as opposed to representation thereof." (App.p.110 line 22-p.111/line 1).

However, Appellant contends that, because of the clearly confusing and deficient language of the indictment and the circumstances surrounding it, there is no evidence to support with absolute certainty, the trial judge's statement the grand jury did in fact pass upon matter correctly. The trial court should have informed the State of the necessity of Re-indictment or obtain a waiver of presentment from the Appellant. Because to attempt to second-guess a grand jury's verdict under the circumstances of this case would be fundamentally unfair.

Appellant argues that the armed robbery indictments should have been quashed, because without a written waiver of presentment, the amendment to his armed robbery indictment deprived

the court of subject matter of jurisdiction, because the amendment changed the nature of the offense charged. (S.C. Code Ann. §16- 11-311(A)(1)(b),(A)(3), 17-19-100)(Generally, amendments to indictments are permitted for the purpose of correcting an error of form, such as a Scriver's error, otherwise, if the defendant objects to an amendment on the grounds that the amended indictment would change the nature of the offense, the trial judge is obligated to inform the parties of the necessity of reindicment or obtain a waiver of presentation from the defendant. Cutner v. State, (S.C. 2003) 354 S.C. 151,580 S.E.2d 120).

(See, also, Stirone, 361 U.S. at 217, 80 S.Ct. at 273. "The right to have the grand jury make the change on its own judgment is a substantial right which cannot be taken away with or without court amendment." *713 Id. at 218-19, 80 S.Ct. 274((emphasis supplied).

Now, as to Appellant's second (2) point; trial counsel was ineffective in failing to object to the trial judge deleting the indictments in his own pen, because, by allowing him to do so resulted in a serious "non-deleted" error, because the indictments still read out completely, the erroneous "or while alleging" language remains, (See, original transcript - Record on Appeal - p. 1380-81 and 1362-63). And although the trial judge deleted or attempted to delete the indictments in his own pen, (App.p.110 line 22-p.lll line 18) the trial judge even stated; "All right. Hang on a second. I've got to do these. Okay." (line 17) while he took the time to delete the indictments in his own pen, right there on the spot. Nevertheless, somehow unamended deficient armed robbery indictments are preserved in the record, a fact which the Appellant contends, under the circumstance here, demonstrates that it*s highly likely that the jury viewed the defective indictments during their deliberations. Thus, resulting in the Appellant being tried and convicted under clearly defective indictments. See, State v. Hann, 196 S.C. 211 (1940) 12 52 2d 720 - Indictment not legally qualified - 192 S.C. 318, 47 S.E2d 276, 109 65 65, 83 S.C. 217, 68 S.C. 318, 47 S.E. 395.

Finally, as to Appellant's third (3) point; that trial counsel was ineffective for failing to object to the trial judge deleting the indictments in his own pen, because, by allowing him to do so resulted

in him making a material change in the nature of the offense charged. The amendment changed the offense charged [from] a violation of section 16-11-330, — which was subsequently amended, effective June 18, 1996, — to provide as follows: (A) a person who commits robbery while armed with a weapon pistol, dirk, slingshot, metal knuckles, razor or other deadly weapon, or while alleging either by actions or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believe to be a deadly weapon, is guilty of a felony...S.C. Code Ann. §16-11-330(A)(Supp.1999)(emphasis added), [to] a violation of Section 11-11-330(1) — which prior to June 18, 1996- provided in pertinent part as follows: any person convicted for the crime of robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor or other deadly weapon shall suffer punishment by imprisonment at hard labor the term of not less than ten years nor more than/twenty-five years, in the discretion of the trial judge, no part of which may be suspended ... S.C. Code Ann. §16-11-330(1)(1976). (See, State v. Muldrow, 559 S.E.2d 847(S.C.2001; "Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Grooms, 343 S.C. 248, 540 S.E.2d 99 (2000). Furthermore, we are bound to construe a penal statute strictly against the State and in favor of the defendant. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)).

Here, the Appellant contends that it is absolutely clear and undisputed that because of the erroneous "or while alleging" language, the armed robbery indictments are defective on their face. Which was why the State moved to amend them. But it is also equally clear that neither the defense, the State or trial judge knew for certainty, whether the grand jury passed on the correct portion of the armed robbery indictments. And, since it is well established that it is the sole duty of the grand jury to pass upon an indictment or not, on its own judgment, Stirone, supra. Thus, the trial judge would erred in speculating as to the grand jury's verdict or making its own judgment [upon] the indictments. Furthermore, in light of the deficiency of, and the confusing and uncertain

circumstances surrounding the indictments, the Appellant argues that, "any" amendment at the time of trial, under such conditions, would be error and inappropriate, and deprived the trial court of subject matter of jurisdiction.

Nevertheless, in Appellant's case, the trial judge does speculate as to what the grand jury's verdict was and trial judge made its own judgment upon the indictments (App.p.110 line 22-p.lll line 18), amending the indictments and deleting from them in his own pen. And the amendment changed the nature of the offenses charged because the two aggravating circumstances in the case sub judice are distinct offenses from one another and thus, the proof required for each aggravating circumstance is material different from one another. Compare S.C. Code Ann. §16-11-330(A) and (l).

Appellant argues that, since that the trial judge erred by allowing the State to improperly amend the armed robbery indictments, trial counsel was ineffective for failing to object to the trial judge deleting the indictments in his own pen, which prejudiced the Appellant because it improperly changed the nature of the offense charged.

The aggravating circumstance upon which Appellant's armed robbery convictions was based has never been presented to the grand jury. Therefore, Appellant argues, that the amendment deprived the trial court of subject matter jurisdiction over the armed robbery charges.

See, State v. Lynch, 545 S.E.2d 511 (S.C.2001). In Lynch, the defendant was convicted of murder and first degree burglary. Defendant appealed. The Supreme Court, Waller J., held that trial court lost subject matter jurisdiction over first degree burglary charge when it permitted state, at outset of trial to amend indictment to replace words "in the hours during darkness" with "caused physical injury." Affirmed in part, and reversed in part.

At the outset of trial, the State moved to amend the indictment on the first degree burglary charge. The State requested that the words "in the hours during darkness" be replaced with "caused physical injury." Over Appellant's objections, the trial court allowed the amendment.

ISSUE: Did trial Judge err by allowing the State to amend the indictment for first degree burglary by changing the aggravating circumstance alleged?

DISCUSSION: Appellant argues that an aggravating circumstance is a required element of first degree burglary, and the aggravating circumstance upon which his burglary conviction was based has never been presented to the grand jury. Therefore, he argues that the amendment to the indictment deprived the trial court of subject matter jurisdiction over the burglary charge.

We agree.

A Circuit Court has subject matter jurisdiction of: (1) there has been an indictment which sufficiently state the offense; (2) there has been a waiver of indictment; or (3) the change is a lesser included charge of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). An indictment is sufficient to confer jurisdiction "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer..." Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995).

An indictment may be amended provided "such amendment does not change the nature of the offense charged." S.C. Code Ann. §17-19-100 (1985). For example, an amendment which changes an offense to one with increased punishment deprives the circuit court of subject matter jurisdiction. Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994); State v. Riddle, 301 S.C. 211, 391 S.E.2d 253 (1990). We note, however, that an amendment may deprive the circuit court of jurisdiction even if it does not change the penalty. See Weinhauer v. State, 334, S.C. 327, 333, 513 S.E.2d 840, 842 (1999). (Citing State v. Sowell, 85 S.C. 278, 675 S.E. 316 (1910).

In Weinhauer, this Court decide that an indictment for second degree burglary was improperly amended when the State added language that that the offense was committed at "nighttime." The amendment changed the offense charged from a violation of Section 16-11-312(A) ("Person enters a dwelling without consent and with intent to commit a crime therein") to a violation

of Section 16-11-312(B) ("[T]he entering or remaining occurs in the nighttime"). S.C. Code Ann. §16—11— 312(Supp.2000). The amendment transformed the offense from being classified as non-violent to violent. The Court held that "by amending the indictment, the solicitor changed the nature of the offense charged because the circumstance of *nighttime' burglary was material to charging defendant with second degree burglary under section (B)." Weinhauer, 334 S.Ct. at 332, 513 S.E.2d at 842.

The Weinhauer Court relied in part on the reasoning of State v. Sowell, 85 S.C. 278,284, 67 S.E. 316, 318 (1910). The Court in Sowell held that breaking and entering in daytime and in the nighttime were distinct offenses, and therefore, the "time of it*s commission was the essence of the offense." This was despite the fact that both offenses belonged to the same class of felonies and were punishable in the same way. Because the two offense were distinct, the Court stated that the amendment substituting nighttime for daytime "not only changed the nature of the offense charged, but substituted an entirely different one for the one charged." Id.

Similarly, the Appellant contends that the amendment errors demonstrated herein from his case, are nearly identical to the amendment errors in Lynch, and Sowell. The amendment in the Appellant's case also changed the nature of the offense charged. And although both offense belong to the same class of felonies and punishable in the same way, they are two distinct offenses, because the aggravating factor of "actually" being armed, (as opposed to "or alleges" to be) was the "essence of the offense." And the amendment here, violated S.C.Code Ann. §17-19-100).

Therefore, since the courts have held that amendments such as the ones discussed herein are error and improper, for they change the nature of an offense charged. The trial judge here, erred in allowing the amendment and deleting from the indictments in his own pen and trial counsel was ineffective for not objecting. Amendment deprived the trial court of subject matter jurisdiction. Thus, it was unreasonable for Appellate Counsel to omit raising this issue on direct appeal.

In light of all the facts discussed herein, it clearly shows that Appellate Counsel's performance fell below the standard of objective reasonableness for attorney's, which negatively affected Appellant's appeal. Mason v. Hanks, supra.

Appellate Counsel's mistake deprived Appellant of his right to the Due Process and Equal Protection Clauses of the Constitution.

With several highly arguable issues at her disposal, either preserved in record or provided by trial counsel (see p.19 of this attachment, lines 6-15; p.20 line 21 – p.21 line 5) Appellate Counsel was ineffective for failing to raise any one of these, especially Appellant's two ineffective assistance of trial counsel allegations discussed herein, and Appellate Counsel lost a chance to argue a claim(s) that would have succeeded.

And this failure resulted in prejudice, since there is a "reasonable probability" the outcome of Appellant's direct appeal would have been different.

Appellant's direct appeal was not taken in good faith. And he was deprived of his right to effective assistance of counsel. Therefore, Appellant is entitled to a belated appeal on his ineffective assistance of Appellate Counsel's allegation.

Appellant and his trial counsel, John B. Shupper, both testified at the PCR hearing. Judge Alison Renee Lee denied and dismissed the application in a written order filed August 22, 2005. The order did not address the issue of ineffective assistance of Appellate Counsel and PCR Counsel did not file a motion to alter/amend judgment under SCRCP Rule 59(e).

Attachment B. Ineffective Assistance of Appellate Counsel

[FOOTNOTE]

Respectfully Appellant points out that; In 1996, the General Assembly amended the armed robbery statute, 1996 Act No. 362. This Act stated that the amendments take effect upon approval of the Governor. The Act was approved on May 29, 1996.

Now, the Respondent may argue that this date is the same date the offense was committed, therefore, the crime would have been committed under the amended statute and the indictments in this case properly cited the elements of the offense.

However, although the act was approved on May 29, 1996, it is not the same date the offense was committed. The offense actually occurred on May 28, 1996, as evident by the facts and testimony on the record (demonstrated below).

Defense counsels and the state misquoted the crime date as May 29, 1996, (App.P.104 line 22-p.105 line 3; p.402 lines 12-13) but the record shows that both victims in this case—Ms. Carla Brown and Mr. Winfred Bull-- and other witnesses testified that the incident began and ended on May 28, 1996, and that it wasn't until sometime after midnight that the police finally responded to the 911 call.

Testimony from the record shows that the victims testified that it was on May 28, 1996, that they met at Mr. Bull's house approximately around 9:00 p.m., where they sat and talked a while before deciding to go for "a ride" and get some gas, then attending a softball game at T.S. Martin Park (see, App.p.461 lines 14- 22; p.462 line 15-p.464 line 4; p.566 line 22-p.567 lines 1, and 7 - 11; p.641 line 25-p. 642 line 2; p.152 line 25-p.153 line 12).

The victims arrived at the park "around 10 something," and then they left and went to Burger King and returned to the park approximately 15 minutes later. (See, App.p.192 line 14-p.193 line 8).

After returning to the park the second time, the victims testified that the game was breaking up, and that it was only a few minutes later, about 10-15 minutes when the lights went out and the first two suspects approached them,(see, App.p.191 lines 8 - 16; p.633 lines 12-15; p.170 lines 5-10; p.193 lines 9-13; p. 613 lines 17-25). And defense witness Frank Manigo who was employed with the City of Columbia Park and Recreation, testified that the lights are on an automatic timer, and the controls to the lights are locked inside a little building, and the lights go off promptly at 11:00p.m. (See, App.p.1109 lines 10-22; p.1110 line 2—p.1112 line 9; p.1253 lines 6-14; p.1263 lines 22-25).

Both victims testified that the incident, "It happened real fast", "It was like real quick thing","...in a matter of several seconds all 5 suspects were upon them and quickly dragging them into an even darker area where there was absolutely no lighting at all, (see, App.p.616 line 22-p. 617 line 10; p.634 line 10- p.635 line 20; p. 155 lines 16-22). More so, witness Carla Brown testified that the whole thing "basically" was less than an hour, but at least 30 minutes. (See, App.p.178 lines 14-20). Witness Winfred Bull provided similar testimony, and stated that it was only "a good 35 or 40 minutes" that he struggled and tussled with the suspects before breaking free. (See, App.p.502 lines 1—7).

After breaking free, Mr. Bull ran to the home of Ms. Vernette Yeadon and explained that he had been assaulted and needed to call the police, Ms. Yeadon was a 'witness for the state and testified that Mr. Bull arrived at her house sometime between 11:30 p.m. and 12:00 a.m. (See, App.p.706 lines 15-20; p.708 lines 8-12).

Both witnesses, Mr. Bull and Ms. Yeadon testified that after calling the police, it was almost an hour, 35-45 minutes before they actually came (see, App.p.516 lines 13-23; p.711 lines 9-14). And state witness, Officer John Walker, with the Columbia Police Department, testified that he was the first officer on the scene in this case and that he arrived at the location "in between"12:00 and 12:30 a.m. (See, App.p.443 lines17-19; p.455 lines 5-7).

Therefore, as testimonies and evidence on the record reflect/ this crime was committed during the 11:00 p.m. hour on Nay 28, 1996. It started shortly after eleven and only lasted 30 to 40 minutes, which is corroborated by state's witness Vernette Yeadon's testimony that Mr. Bull arrived at her home "between" 11:30 p.m. and 12:00 midnight on May 28, 1996. Thus, the offense occurred the day before the 1996 Act No. 362 amended armed robbery statute was approved on May 29, 1996.

Additionally, although the Governor approved the Act in May of 1996, it still did not become effective until June 18, 1996 (as quoted by State v. Muldrow, 559 S.E.2d 847 (S.C.2001)).

[Also, the Appellant respectfully ask; Since the Governor signed off on the statute sometime during the day...Wouldn't this make every offense that happen before the actual signing, not fall under the new statute? Therefore, pre-signing offenses would have to have been retroactively applied? Something Appellate counsel and PCR counsel could have looked at for a possible Newly Discovered Evidence Issue at Direct Appeal/PCR?]

is that right?

A Correct.

Q Do you recall your representation of Kenneth James in this case?

A Yes.

Q You have sat in the courtroom and heard the four primary arguments that Mr. James is proceeding on today?

A Yes, I have.

Q Do you understand his first claim is that the judge should not have charged the hand of one, hand of all, or as he called it, the aiding and abetting charge? What is your recollection of that? Was that a charge submitted by you or by the solicitor in the case?

A I don't recall. Mr. Strickler and I, I think we were fairly complete, comprehensive, and aggressive in all our legal arguments here. We made several proposed jury instructions.

We responded to some of the State's proposed ones, but I have no specific memory of the hand of one, hand of all, the aiding and abetting. I just don't recall how it came about, the particulars of it.

Q Okay. Well, moving on to his second argument, he

is saying that there were errors in the indictment that were cured by the judge over your objection. Do you recall that?

A Yeah, I'm kind of -- I don't think that the Court has been given a complete picture of that argument here today; but, yes, I do recall that argument.

Q Is it your testimony that you did the best you could to try to quash that indictment?

A Yes.

Q At the end of your argument, the Court ruled against you; correct?

A Correct.

Q I want to ask you the same question I asked Mr. Strickler. What else can you do if you make the argument and you are ruled against? What else could you have done?

A What we could have done is that indictment issue is so significant because the way the Court structured the sentence if that indictment were quashed right now, he would be having a 30-year sentence, not 40. So it's very significant.

I'm convinced that that's the reason that Judge Pleicones set the sentence up that way because he wanted that issue reviewed on appeal.

So I don't know if appellate counsel did that or not.

I am dumfounded that appellate counsel is not here today. But you need an appellate court to rule on a issue. It hadn't happened yet to my knowledge.

So to answer your question, what I should have done different, I should have beat appellate counsel over the head to review that issue.

I should have tried to persuade you to bring that issue up today because you apparently are unaware or you can't fully appreciate how important that is to Mr. James. So that's what I should have done different.

Q Okay. Essentially after you handle a case, you turn it over to Appellate Defense or whoever is handling the appeal. What other duties do you traditionally have, if any?

A I hand it over to Appellate Defense and occasionally I will follow up on some issues, as I have in the past with the appellate counsel. I have also contacted P.C.R. counsel before P.C.R.s if I believe there is something that's offensive or that stands out.

Q You didn't have any contact with me in this case,

right?

A That's correct.

Q Okay.

A And you did not contact me either.

Q That's right. You seem to feel that the errors in the indictment are fairly important?

A Correct.

Q What is the importance of that?

A If that indictment were quashed, the way I read Judge Pleicones' sentencing, that would take 10 years off his sentence; and he would have a 30-year sentence.

That's not going to the merits of the argument. That would be the effect of it if it were quashed. I'm not sure what the term would be at the appellate level. They may say it should have been quashed. So I think it has a -- I believe there is potential merit to that argument.

Q But now with the merit, would it be on P.C.R. or on appeal?

A Well, if he did not get appellant review of that issue, then the P.C.R. counsel has to articulate that his appellate counsel was ineffective. There has to be a procedural vehicle for him to

have that argument heard on appeal.

So whatever you term it, maybe he didn't hear it on direct appeal, then this would be a procedural vehicle to do that. From what I can tell -- again, I don't know what happened on appeal -- I gave a laundry list of potential arguments to appellate counsel. I have not reviewed the appellant record. I don't know if that issue was heard or not. I suspect not but I don't know.

Q Was appellate counsel receptive to any of your points?

A I don't know. I know that I prepared a substantial list of potential arguments, as Mr. Strickler said six pages long. I don't know what happened to it after that though.

Q Well, I guess, was this a face-to-face conversation?

A Oh, no.

Q This was over the mail or by telephone?

A That's right.

Q You don't have any indication as to how receptive appellant counsel was to those particular arguments?

A That's right, I don't.

positions?

THE WITNESS: If you can bear with me one moment, Your Honor. I want to say no. If I can just scan my memo to Appellate Defense really quick, really quickly.

(Pause).

THE WITNESS: Your Honor, to answer your question, I did not advise Appellate Defense about any potential conflict issues as far as a joint appeal. In fact, I addressed joint appeal in the letter that I wrote Appellate Defense, and it's two sentences if I can read it to the Court.

THE COURT: Yes, sir.

THE WITNESS: "Kenneth James was tried along with his brother Robert James. Robert was represented by P.D. conflict attorney John Shupper." Generally each Defendant joined in the other's objections slash motions at trial. So I did not advise Appellate Defense of any potential conflict issues.

THE COURT: And you have no knowledge as to the issues that you thought would have been a good issue to litigate on the appellant level whether that was in fact raised by the Appellate Defense or not?

THE WITNESS: Exactly. Your Honor, if I may add, in the six-page letter I wrote Appellate Defense,

I put a one paragraph description of that issue. I devoted more time in this letter to that than to any of the other 20 or 30 issues I mentioned here. So I don't know what happened once the appeal process started.

THE COURT: Anything that y'all want to ask Mr. Sneed concerning matters that I raised?

MR. JOHNSON: Nothing from the Plaintiff, Your Honor.

THE COURT: Mr. Hamilton?

MR. HAMILTON: Nothing from the State, Your Honor.

THE COURT: Thank you, Mr. Sneed.

THE WITNESS: Thank you, sir.

THE COURT: Anything further?

MR. JOHNSON: Your Honor, I think we are going to rest. I would like to make an amendment to his P.C.R. application basically so that the pleadings would conform to the evidence, which I think we can do in this case.

We have alleged ineffective assistance of appellate counsel, specifically that appellate counsel had a conflict of interest, which may or may not have been borne out by the testimony today.

But I think so that that allegation will