

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

D. Craig Brown, Circuit Court Judge

ANDRE M. MASSEY,

RECEIVED

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S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001389

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief 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

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ISSUE PRESENTED

Trial counsel erred in failing to object to the trial judge's comment on the facts via the jury charge that "a gun may be a deadly weapon even if it is not operating."

STATEMENT

Petitioner Andre Massey was convicted of armed robbery and possession of a weapon during a violent crime per jury trial held during the August 2009 term of the Sumter County General Sessions Court before Judge George C. James, Junior. Petitioner was sentenced to life without parole. App. 1-538. Petitioner was represented at trial by Arthur Wilder, Esquire, and Calvin Hastie, Sr., Esquire, and Assistant Solicitor Martin D. Spratlin appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed by the South Carolina Court of Appeals. See State v. Massey, Opinion No. 2012-UP-098 (S.C. Ct. App. filed February 22, 2012). Assistant Appellate Defender LaNelle Cantey Durant of Appellate Defense represented petitioner on direct appeal.

On December 6, 2013, petitioner filed a PCR application with the Sumter County Courthouse alleging ineffective assistance of counsel in his case. App. 539-551. The respondent filed a return dated May 13, 2014, requesting that a hearing be held in response to petitioner's PCR application. App. 552-555. Petitioner filed an Amended PCR Application on January 7, 2015. A PCR hearing was convened on March 29, 2017, at the Sumter County Courthouse before Judge D. Craig Brown. App. 591 – 650. On June 12, 2017, Judge Brown signed an Order of Dismissal in the case denying petitioner's allegations of ineffective assistance of trial counsel. App. 651-660.

Petitioner appealed Judge Brown's Order. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to the trial judge's comment on the facts via the jury charge that "a gun may be a deadly weapon even if it is not operating."

At trial, Herbert Huff testified that he was working as a manager at his Total Living Clothing Store in Sumter on June 7, 2007, when a male walked in around 5:30 p.m. as the store was about to close. The male presented a "handgun" and asked for "[his] cash." Huff stated that the man took money from his wallet and cash (\$389.00) from the register and then fled. App. 232, l. 19 – p. 233, l. 12; App. 234, l. 5-14. The man, who was arrested later, had been identified as petitioner.

Huff's testimony was centered chiefly around the "gun." Actually, the case itself was centered mainly on the existence of the gun because both charges filed against petitioner were gun related. Huff stated that petitioner presented a "handgun." Tr. 232, l. 6. Huff's description given to police included that fact that the suspect "held the gun in his left hand." App. 297, lines 11-12. The solicitor asked Huff "what was the first thing he did when he had the gun on you" and "was the gun still pointed at you," and "what kind of gun was it." App. 232, lines 17-18; App. 233, lines 18-19; App. 234, l. 17. Also, the gun in question was admitted into evidence as state's exhibit #4 over counsel's objection (but overruled) due to the prejudicial value (undue emphasis presumably) of the jury viewing the gun. Tr. 236, l. 1- p. 238, l. 9. The trial judge advised the jury regarding the weapon as follows:

Ladies and Gentlemen, some reference may be made to a firearm at this point. I wanted to make sure you understand this: It is unloaded and it will be in an open position at all times and it will be handled by the barrel. App. 239, lines 21-25.

Then, when giving the jury instructions in the case, note the trial judge's following jury

charge on the gun:

And finally, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon during the robbery. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm, and whether an instrument has been used as a deadly weapon depends on the facts and circumstances of the case. The following are examples of instruments which may be deadly weapons, pistol, shotgun, rifle, dagger, knife, slingshot, metal knuckles, razor, a firebomb, or a Molotov cocktail. A gun may be a deadly weapon even if it is not operating. App. 509, l. 19 - p. 510, l. 4.

During the PCR hearing held in the case, petitioner testified that the trial judge erred (in effect commented on the facts) when he charged the jury that a gun would constitute a deadly weapon. App. 598, l. 23 – p. 601, l. 21; App. 631, l. 12 – p. 632, l. 7.

Trial counsel testified during the PCR hearing and stated that he did not object to the trial judge's comments that referenced a gun as a deadly weapon. App. 623, l. 20 – p. 624, l. 15. The PCR judge ruled that the charge was standard and not objectionable and that counsel was not deficient in failing to object to the charge. App. 656-657.

Armed robbery is defined under S.C. Code Ann. 16-11-330 as follows:

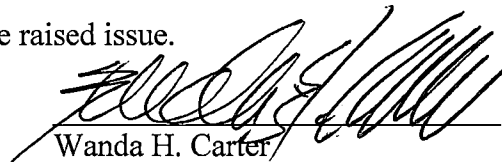
(A) A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonable believed to be a deadly weapon, is guilty of a [armed robbery].

In this case, the judge specifically charged the jury that a deadly weapon would constitute a gun. A gun is not listed in the statute as a deadly weapon. It was the jury's duty to deliberate and make a factual finding as to whether this gun, which was highlighted continually at trial, was a deadly weapon. Judges shall not charge juries with respect to matters of fact, but shall declare the law. S.C. Const. V, § 21. For example, in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480

(2016), the Court reversed because the trial judge's instruction that the testimony of the victim need not be corroborated in a criminal sexual conduct case was an unconstitutional charge on the facts. Here, since possession of a deadly weapon was an essential element of the offense of armed robbery, the trial judge erred in instructing the jury that the gun used in the case would be considered a deadly weapon. Clearly, this was not harmless error because it cannot be concluded that this comment on the facts did not contribute to a verdict of guilty on the armed robbery charge against petitioner. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Therefore, counsel's error in failing to object to the trial judge's charge on the facts in petitioner's case violated the Sixth Amendment's guarantee of receipt of competent counsel in a criminal trial; and but for counsel's deficient performance in failing to object in this regard, a reasonable likelihood exists that the outcome of petitioner's trial would have been different.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of December, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

Honorable D. Craig Brown, Circuit Court Judge

ANDRE M. MASSEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

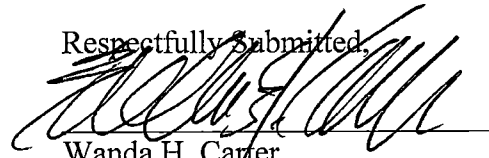
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Andre Maurice Massey states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. She has reviewed the record of petitioner's trial before Judge D. Craig Brown, which was held on March 29, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve her as counsel for Andre Maurice Massey.

Respectfully Submitted,

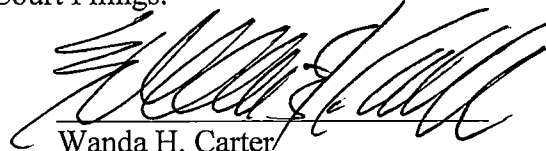


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of December, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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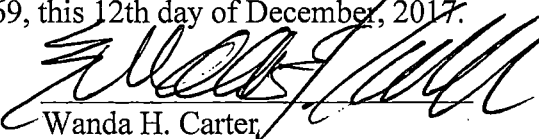
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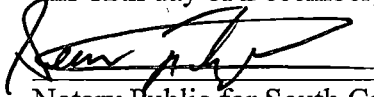
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Andre Maurice Massey, #229492, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 12th day of December, 2017.


Wanda H. Carter,
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2017.

 (L.S)
Notary Public for South Carolina

My Commission Expires: 10/30/2022.