

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable R. Ferrell Cothran, Circuit Court Judge S.C. SUPREME COURT

JAMES TINSLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002428

APPENDIX

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JURY CHARGE

1 You've heard testimony that Mr. Tinsley eluded the police. I
2 think based on that evidence there's a sufficient finding for
3 ya'll to establish that Mr. Tinsley is guilty of the crime of
4 receiving stolen goods. Thank you.

5 THE COURT: Ladies and gentlemen of the jury, that
6 concludes the closing statements or arguments made in this
7 case. I told you when we reached this stage of the proceeding
8 it would be my responsibility to charge you on the law to be
9 applied. First thing I'm going to do is go over with you
10 again the indictment in this case. Again, the indictment is
11 the document that brings the case before the Court and informs
12 us of the charge to be tried, it informs the defendant of the
13 charge that's been lodged against him, it's -- and I've told
14 you that to this indictment the defendant has pled not guilty
15 and that puts the burden upon the State to prove the
16 allegations contained in the indictment by proof beyond a
17 reasonable doubt. I'm going to go over the indictment with
18 you at this time. The indictment in its body is for the
19 offense of receiving stolen goods. The the body of the
20 indictment states that, James Tinsley, Jr. did in Spartanburg
21 County on or about October 11 of 2006 receive or possess
22 stolen goods of Holiday Kamper as described as follows: a
23 camper of the value of more than \$5,000, such goods having
24 been feloniously taken and carried away with the intent to
25 deprive the owner thereof permanently of such goods and that

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1 the said defendant knew or had reason to believe that such
2 property had been stolen in violation of Code Section
3 16-13-183 of the Code of Laws of South Carolina 1976 as
4 amended against the peace and dignity of the state and
5 contrary to the statute in such case made and provided. Now I
6 will remind you that the fact that a defendant has been
7 charged, arrested or indicted in a case is not evidence in the
8 case and cannot be considered by you as evidence of guilt in
9 the case nor does it create any presumption or inference of
10 guilt. The document is simply the formal document again which
11 contains the charges made against the defendant, it's the
12 formal document which has brought this case into this court.

13 Now the defendant as I told you pled not guilty to the
14 indictment and that plea puts the burden upon the State to
15 prove the defendant's guilt. A person charged with the
16 commission of a crime or offense in South Carolina is never
17 required to prove himself innocent. I charge you that it's an
18 important rule of law in a criminal trial no matter what the
19 seriousness of a crime the charge might be that the defendant
20 is always presumed to be innocent of the crime for which the
21 indictment has been issued unless and until guilt has been
22 proven to you, the jury, by evidence satisfying you of that
23 guilt beyond a reasonable doubt. The presumption of innocence
24 doesn't end when you begin your deliberations, it accompanies
25 the defendant throughout the proceeding and into your

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1 deliberations until such time as you, the jury, reach a
2 verdict of guilt based on evidence satisfying you of that
3 guilt beyond a reasonable doubt. Many people describe the
4 presumption of innocence somewhat like the robe that's placed
5 about my shoulders when I come into the courtroom, that that
6 presumption of innocence remains about the defendant's
7 shoulders throughout the trial and into your deliberations
8 until such time as it has been stripped from him by evidence
9 that satisfies you of the defendant's guilt beyond a
10 reasonable doubt. The presumption of innocence is not a, just
11 a mere legal theory, it's not just a legal phrase, it's a
12 substantial right that every defendant is entitled to unless
13 you, the jury, are satisfied from the evidence presented in
14 the trial of the defendant's guilt beyond a reasonable doubt.

15 Now I've already talked to you several times and I
16 mentioned at the beginning of the trial that the burden of
17 proof is proof beyond a reasonable doubt and you may be asking
18 yourself well just what is the legal definition of a
19 reasonable doubt. A reasonable doubt is that kind of doubt
20 which would cause a reasonable person to hesitate to act and
21 the State has the burden of proving the defendant guilty
22 beyond a reasonable doubt. Now some of you may have
23 participated in or been involved in civil trials. Civil
24 trials are where someone is seeking monetary damages for
25 either an injury, some wrong, or a violation of contract or

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1 something of that nature and in those cases the standard of
2 proof is proof by the greater weight of the preponderance of
3 the evidence, the scales of justice tilting ever so slightly
4 one way or the other, that's the standard of proof in a civil
5 case, that is not the standard of proof in this case. Again,
6 the standard of proof in this case is proof beyond a
7 reasonable doubt. It's a more powerful standard of proof than
8 that used in civil cases. Proof beyond a reasonable doubt
9 would be that kind of proof that leaves you firmly convinced
10 of the defendant's guilt. Now there's very few things that go
11 on in human life that can be proven beyond any doubt
12 whatsoever and that's not the standard to which the State is
13 placed in a case such as this and the criminal law does not
14 require proof that overcomes every possible doubt. I will
15 tell you if based on your consideration of the evidence if you
16 are firmly convinced that the defendant is guilty of the crime
17 charged beyond a reasonable doubt, you must find the defendant
18 guilty; however, on the other hand, if you think there's a
19 real possibility that the defendant is not guilty then you
20 must give the defendant the benefit of that doubt and find him
21 not guilty.

22 I will remind you that during this trial that you and
23 I've had certain duties to perform. As the trial judge it's
24 been my responsibility to preside over the case. I've also
25 had the duty of ruling on the admissibility of evidence, the

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1 appropriateness of questions being asked and the evidence
2 that's being presented to you. I will tell you that you are
3 only allowed to consider the competent evidence that was
4 entered into the record of this case. If at any time during
5 this trial I ordered a matter stricken from the record or not
6 entered into the record, you have no right to consider that
7 information at all in reaching your verdict, you should
8 disregard that information in its entirety. You're to only to
9 consider the evidence and the testimony that has been
10 presented from this (indicating) witness stand and whatever
11 exhibits came into the record through that testimony or by the
12 agreement of counsel.

13 I have again the additional duty of charging you
14 concerning the law to be applied in this case and as the
15 presiding judge I told you at the beginning of the trial I am
16 the sole judge of the law in this case. It's your duty as
17 jurors to accept and apply the law as I now give it to you to
18 the facts as you determine them to be and that should put you
19 in a position to reach a just and a true verdict in this case.
20 I told you earlier if you had any idea as to what the law is
21 or what it ought to be you should leave those notions outside
22 of the jury room because under the oath that you've taken it's
23 your responsibility to take the law as I give it to you and
24 apply it in this case.

25 Now with the same law that makes me the sole judges of

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1 the fac -- of the law in this case makes you the sole judges
2 of the facts in this case. You should not take from anything
3 that I have done in the discharge of my duties as the
4 presiding officer in this trial to indicate to you that I have
5 any preference whatsoever as to how you should determine the
6 facts. The law doesn't allow me an opinion on that subject
7 and just as you cannot disagree with me concerning the law, I
8 can can have no opinion concerning how you determine the facts
9 in this matter. It is your duty as the finders of the fact to
10 determine the effect, the value, the weight, and the truth of
11 the evidence that you've heard during this trial. In doing so
12 you have the right to consider two different types of evidence
13 that were presented in the trial and let me explain to ya what
14 I mean by two types of evidence. First of all, the first type
15 of evidence that you have the right as a jury to consider is
16 what we call "direct evidence". Now direct evidence is
17 testimony given by a witness who claims to have direct
18 knowledge about the facts that that witness is testifying,
19 that is somebody who's testifying about as as an eye witness
20 or a participant in an event that occurs; in other words, they
21 claim to have direct knowledge of the things about which that
22 witness testifies. The other type of evidence that you have
23 the right to consider is what is known as or called
24 "circumstantial evidence". Now circumstantial evidence is
25 proof of a chain of facts or or circumstances which indicate

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1 the existence of a fact. It is evidence which immediately
2 establishes some collateral facts from which you as a jury
3 might reasonably infer the existence of some other fact.
4 Circumstantial evidence therefore is based upon inference,
5 it's not based upon personal knowledge or observation. Now
6 the law makes absolutely no distinction between the weight or
7 the value that you, the jury, have the right to give to either
8 direct or circumstantial evidence nor is there a greater
9 degree of certainty required of circumstantial evidence than
10 that of direct. You, the jury, have the right to weigh all of
11 the evidence in this case. I will tell you that if after
12 weighing all the evidence you're not firmly convinced of the
13 defendant's guilt beyond a reasonable doubt, you must find the
14 defendant not guilty; however, if you are firmly convinced of
15 the defendant's guilt beyond a reasonable doubt, you should
16 find the defendant guilty.

17 Now necessarily in doing your job as the sole judges of
18 the facts, it's gonna be necessary that you determine the
19 credibility and believability of the witnesses that you have
20 heard during this trial, that's what credibility means, it
21 means believability. It's your duty as jurors again to
22 analyze the evidence, evaluate the testimony, determine which
23 testimony or evidence convinces you of its truth. In
24 determining believability of witnesses who have testified in
25 this case, I told you earlier you can believe one against all

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1 the others or all the others against one. You can believe all
2 of what a witness tells you, part of what a witness tells you,
3 or none of what a witness tells you. You may consider whether
4 or not a witness has exhibited to you any interest, bias, or
5 prejudice in the matters that are before the Court or any
6 other motive in testifying in this case. You have the right
7 to consider the appearance and the manner of the witness in
8 testifying from the witness stand.

9 Now I will instruct to you and I will emphasize to you
10 the fact that the defendant did not testify in this case is
11 not a factor to be considered by you at all in your
12 deliberations and in your consideration of the question of
13 guilt or innocence, it must not be considered by you in any
14 manner whatsoever. I will tell you that a defendant has a
15 constitutional right to remain silent. The assertion of that
16 right by a defendant must not be considered by you in your
17 deliberations and I will repeat to you under your oath you are
18 to draw no conclusion whatsoever from the fact that the
19 defendant did not testify. The fact that the defendant did
20 not testify should not even be discussed by you in the jury
21 room. I told you at the beginning of the trial and it's true
22 throughout this trial the only burden of proof in this case is
23 upon the State to prove the defendant guilty beyond a
24 reasonable doubt, the defendant is not required to prove his
25 innocence. Again, the burden of proof remains upon the State,

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1 that is to prove guilt beyond a reasonable doubt.

2 Now in order to establish criminal liability, criminal
3 intent is required, that's the mental state required to be
4 proven by the State for a particular crime and it might be
5 purpose, it might be intent, knowledge, recklessness or
6 criminal negligence, criminal intent must be proven by the
7 State beyond a reasonable doubt and I'll tell ya intent or
8 criminal intent is a matter that it must always be determined
9 from the circumstances shown to be surrounding the situation
10 because there's no way to prove intent to a mathematical
11 certainly or by direct evidence. We don't have the ability to
12 cut someone's head open and look at their brain and determine
13 what they intended to do in any particular situation so
14 therefore intent is always proven from the facts and
15 circumstances that are shown to have existed at the time of
16 the particular incidence, this may be inferred from those
17 facts and circumstances, that's how you make the determination
18 of whether or not the element requiring intent in a crime is
19 present. It's not necessary to establish intent by direct or
20 positive evidence; again, it can be established by inference
21 the same way as any other fact, that is, by taking into
22 consideration the acts of the parties and all of the facts and
23 circumstances of the case. Now criminal intent is a mental
24 state, it's a conscious wrongdoing and it's up to you to
25 determine what the defendant intended to do based upon the

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1 circumstances shown to have existed at that time.

2 Now during the trial there was evidence that was
3 presented that witnesses may have made prior statements which
4 were not necessarily consistent with the present testimony
5 that they offered during the trial. You may use the evidence
6 of what -- of someone making a prior inconsistent statement to
7 decide whether or not to believe that witness. You may also
8 use evidence of an earlier contradictory statement to
9 determine the truth of the statements. It's up to you to
10 decide whether earlier statements or present testimony is
11 true. If the defendant has been shown to have knowingly
12 testified untruthfully concerning any material matter, you may
13 consider this in determining whether to trust the witness's
14 testimony on -- as to other matters; again, as all other
15 witnesses you have the right to give the testimony the weight
16 that you think it deserves.

17 Now I will charge charge you that mere presence at the
18 scene of a crime is not sufficient to show that someone is
19 guilty of a crime. A defendant's presence where a crime may
20 have be committed or mere association with persons who
21 commits -- commit a crime does not make a defendant an
22 accomplice, an aider or abettor of the person who commits the
23 crime. The burden is upon the State to prove every element of
24 the crime that's charged, in this case receiving stolen goods.
25 If you find after reviewing all of the evidence that the State

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1 has proven that the defendant was only present at the scene of
2 a crime and that they have not proven beyond a reasonable
3 doubt any other participation in the crime, then you must find
4 the defendant not guilty. The law is that proof of someone
5 being at the scene of a crime is not sufficient to find
6 someone guilty of the commission of that crime.

7 Now in this particular case the defendant is charged with
8 receiving stolen goods and when I read the indictment to you
9 I went over and indicated that it was alleged to have been
10 in violation of Code Section 16-13-180. I'm going to go over
11 that particular code section with you now. The defendant is
12 charged with receiving stolen goods and under that code
13 section -- section the State must prove beyond a reasonable
14 doubt that the defendant bought, received, or possessed goods
15 or other property and that the defendant knew or had reason to
16 believe that the property was stolen. Now whether the
17 defendant knew or had reason to believe that the property was
18 stolen may be shown by either direct or circumstantial
19 evidence. The State may prove that the defendant knew or had
20 a reason to believe that the property was stolen by showing
21 that the defendant knew facts that would make a reasonable
22 person believe that the property was stolen.

23 Now in this case, ladies and gentlemen, there will be two
24 possible verdicts for you to reach and that is on this
25 indictment that I've gone over to you whether or not the

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1 defendant James Tinsley, Jr. is either not guilty or guilty.
2 Now I've placed that on a verdict form in in a certain order
3 but I will tell you that the order that I place those two
4 choices on the form is no indication of my preference
5 concerning those two verdicts, there's only two choices, this
6 is the way it is on my computer and when we print that out
7 that's the order that they come out in but again it shows no
8 preference on my part as to one verdict or the other. The
9 verdict however must be unanimous by you, that means each and
10 every one of you must agree upon the verdict before it becomes
11 the verdict of the jury. Now, Ms. Paslay, you're in the, in
12 the foreperson's chair and I'm going to make you the
13 foreperson of the jury that means that you will be the person
14 who will be responsible to preside over the deliberations of
15 the jury, it'll also be your responsibility to communicate
16 with the Court if that becomes necessary. Now during your
17 deliberations you may have questions that you would like to
18 ask of the Court and I will tell you I would ask that you
19 agree upon the form of the question; the foreperson will place
20 that question in writing on a peace of paper, submit it by the
21 bailiff to me by knocking on the door and passing the question
22 to the bailiff. I will tell you that I'm not allowed to
23 answer each and every question that you might have during your
24 deliberations. As you're aware we have different functions
25 and I can't become involved in your decisions concerning the

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1 facts of the case. I can answer questions such as the
2 procedure that we're following, questions concerning the laws
3 that I have charged you on and questions concerning the
4 evidence that you've heard but I'm not asking the foreperson
5 to edit any questions. Whatever the question is the jury has
6 place it on -- in writing, submit it to me and I'll decide
7 what the appropriate answer is or if I can answer at all and
8 inform you of those responses; so you do have the right to
9 communicate but that must be done through the foreperson in
10 writing and then we'll determine how the responses will take
11 place. Now once you've reached a verdict it'll be the
12 foreperson's responsibility to check the appropriate block,
13 sign and date the form, again, knock on the door let the
14 bailiff know that a verdict's been reached, we'll ask you to
15 step back into the courtroom for us to receive the verdict in
16 the matter. I've gone over a lotta things with you and and I
17 wanna be sure that I haven't misspoken or left something out
18 that I should have covered so I'm going to go over these
19 matters with the attorneys right now, also we have to reach an
20 agreement as to what exhibits have been admitted and what can
21 go with you back into the jury room for your consideration
22 during deliberations so we've got to iron that out too before
23 you begin your deliberations so, madam forelady, one more time
24 retire to the jury room, don't begin your deliberations until
25 I give you your final instructions. You may retire to the

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1 jury room.

2 (The following takes place outside the presence of the
3 jury.)

4 THE COURT: State have any objections to the charge?

5 MR. KENDALL: No objections, Your Honor.

6 THE COURT: Defense have any objections to the charge?

7 THE DEFENDANT: Just subject to our previous objection.

8 THE COURT: Okay, the exceptions you took to your
9 request ---

10 THE DEFENDANT: Correct.

11 THE COURT: --- is that what you're referring to?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Alright. I'll leave the charge as it is.

14 I'll ask the -- Mr. Tinsley and the State to review the
15 evidence. Le -- let's reach an agreement as to what's going
16 back.

17 (Whereupon, counsel reviewed the exhibits.)

18 THE COURT: Alright, do we have an agreement as to what's
19 going back?

20 THE DEFENDANT: I believe so, Your Honor.

21 MR. KENDALL: Yes, sir.

22 THE COURT: Alright. Give the -- if you would, Donny, if
23 you'll take possession of that -- those items right there
24 (indicating). Alright.

25 THE BAILIFF: These? Both?

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1 MR. KENDALL: Yes, sir.

2 THE BAILIFF: Okay.

3 THE COURT: Alright, if you'll have a seat I'll bring the
4 jury in and give them their final instructions.

5 (The following takes place in the presence of the jury.)

6 THE COURT: Bailiff, if you would please pass this over
7 to Ms. Paslay. Thank you. Alright, madam forelady, I have
8 had -- handed to you the verdict form that we'll use in this
9 case. The top of it indicates the state and county and the
10 court in which we're located, below that it indicates the
11 State vs. Mr. Tinsley the name of the case and over to the
12 right the case number and the fact this is a verdict form.
13 The verdict -- the question presented to the jury is, As to
14 this indictment for receiving stolen goods, we, the jury,
15 unanimously find the defendant James Tinsley, there's a choice
16 for not guilty and guilty, I'll ask that you put a check or an
17 "x" on the blank beside the appropriate verdict, once it's
18 been unanimously reached by the jury then you will sign the
19 document below the statement that the jury has reached a
20 unanimous verdict and date it today's date. Once you've
21 completed the form and the verdict's been reached, notify the
22 bailiff, we'll ask you to return to the courtroom. The
23 bailiff will be handing to you the exhibits that have gone
24 into the record, you'll have those in your possessions for
25 your review. At this time I will advise you to return to the

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1 jury room and begin your deliberations. Thank you very much.

2 (Whereupon, the jury began deliberations at 2:05 p.m.)

3 (The following takes place outside the presence of the
4 jury.)

5 THE COURT: Any objections to my final instruction from
6 the State?

7 MR. KENDALL: No objections.

8 THE COURT: Any to my final instruction from the defense?

9 THE DEFENDANT: No, Your Honor.

10 THE COURT: Court'll be in recess until such time as a
11 verdict's been reached. I'm gonna be taking some guilty pleas
12 shortly so if you could clear the equipment and get your stuff
13 together because they'll be other people in the courtroom.

14 (Whereupon, a recess was taken.)

15 THE COURT: Alright, I'm back on the record in State vs.
16 Tinsley. I have received an inquiry from the jury. First of
17 all, they appear to have li -- they want us to clarify certain
18 dates for them. First question is they want the date when the
19 off-duty officer went to Bill Dotson's to view the vehicle;
20 secondly, the date the camper was reported missing; thirdly,
21 the date the camper was moved to the grandmother's house;
22 fourthly, the date Tinsley, Sr. called law enforcement and;
23 finally, the date Tinsley, Jr. made statements to law
24 enforcement. Now I believe there were two different
25 statements made by Mr. Tinsley, Jr. to law enforcement, is

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1 that correct?

2 MR. KENDALL: As a matter of statements, Your Honor, ---

3 THE COURT: Yes.

4 MR. KENDALL: --- he --he -- the only statement that was
5 brought out in this trial was the one he gave I believe on the
6 7th where he was talking ---

7 THE COURT: Of December?

8 MR. KENDALL: Of December, yes, where he was talking to
9 Detective Beck. He did, Mr. Tinsley did talk to Detective
10 White about, um, a -- something he told him after that in some
11 report.

12 THE COURT: Alright, well I'm I'm reluctant to supply any
13 factual information to a jury unless both sides are able to
14 agree or stipulate that the record is not in dispute on those
15 particular questions. The dates I would think most of them
16 are not in dispute. I don't know that we're disputing the
17 dates and that's the reason I'm going to ask whether or not we
18 can agree on these. If we can't then, it would be up to them
19 to decide if they need to listen to the en -- I guess all the
20 testimony again.

21 THE DEFENDANT: The the only date that I wouldn't agree
22 on is the one with Beck. The date might be right but the
23 conversation didn't have anything to do with this camper, it
24 had to do with the ones that were stolen ---

25 THE COURT: Well again, I'm I'm just gonna answer their

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1 questions. I'm not gonna comment on what was said or anything
2 of that nature. They're wanting dates so my question for you
3 would be as to the date the off-duty officer went to
4 Mr. Dotson's house.

5 MR. KENDALL: I don't believe he gave a specific date,
6 Your Honor. I believe his statement was around December 2006,
7 around early December 2006.

8 THE DEFENDANT: December 2nd 2006.

9 THE COURT: Would you agree with December 2nd?

10 MR. KENDALL: Yes.

11 THE COURT: '06?

12 MR. KENDALL: Yes, sir.

13 THE COURT: The next date they wanted was the date the
14 camper was reported missing.

15 THE DEFENDANT: October 10th ---

16 (Whereupon, a discussion was held off the record.)

17 MR. KENDALL: I believe that was October 12th, um, that
18 it goes by this.

19 (Whereupon, a discussion was held off the record.)

20 MR. KENDALL: Yep, 10/12/2006, Your Honor.

21 THE COURT: 10 ---

22 MR. KENDALL: 12, the 12th of October.

23 THE COURT: Would you agree that that's the correct date?

24 (Whereupon, a discussion was held off the record.)

25 MR. KENDALL: Yes, Your Honor. The actual incident date

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1 was the 11th and then the report date I believe or the date
2 the officer signed it was the 12th as I understand it. It
3 said his report is between 10/11/2006 and 10/12/2006 this
4 happened so I believe it would have been reported that 12th
5 that span two days, that's ---

6 THE DEFENDANT: It must be from one night to the next day
7 so the 12th woulda been the day it was reported.

8 THE COURT: The 12th was when the report went in.

9 THE DEFENDANT: That's correct.

10 THE COURT: The date the camper was moved to the
11 grandmother's house.

12 MR. KENDALL: I believe December 2nd.

13 THE COURT: Well that's the same date you've given me for
14 the off-duty officer looking at the vehicle.

15 THE DEFENDANT: That -- that's right. I think, I think
16 it was moved on the 2nd and November 27th or somethin' was
17 when ---

18 THE COURT: See there's a problem here. I knew it'd get
19 to this.

20 THE DEFENDANT: --- when he went to look at it.

21 MR. KENDALL: Yeah, I thought, I I thought his testimony
22 was around early December as I don't think he ever gave a
23 direct date either one of 'em on, uh, ---

24 THE COURT: So as far as the off-duty officer's concerned
25 there is no specific date.

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1 MR. KENDALL: There there was a not a specific date
2 given. I believe they did testify though to like I think it
3 was around early December of 2006.

4 THE COURT: And you agree on that, Mr. Tinsley, or not?
5 I mean, if ya can't ---

6 THE DEFENDANT: Well I ---

7 THE COURT: The jury's got a duty to listen to the
8 testimony. I on -- would only do this if we can stipulate
9 that the information I give them is correct.

10 THE DEFENDANT: I would agree with the -- that that it
11 wasn't -- he wasn't real specific about it.

12 THE COURT: Well I'm just gonna say that no specific date
13 was given.

14 THE DEFENDANT: I would agree with that.

15 THE COURT: Alright. Let's go -- so the camper was moved
16 to grandmother's house on the 2nd. The date Mr. Tinsley, Sr.
17 called law enforcement?

18 MR. KENDALL: Was the 12th was the day he called, the
19 13th was the day they showed up.

20 THE DEFENDANT: Can can we get a clarification. Is that
21 the date that he called to North Carolina?

22 MR. KENDALL: That was ---

23 THE DEFENDANT: Is that the date they're looking for?

24 THE COURT: Just says law enforcement. It doesn't say
25 what branch of law enforcement.

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1 THE DEFENDANT: I think they're tryin' to get at the
2 first, the first time that he called and checked about it. I
3 think that all started ---

4 THE COURT: Well I'm not gonna speculate as to what
5 they're tryin' to decide, that's not my job, not yours either.
6 If there's a date that he called North Carolina Law
7 Enforcement and then a date that he called South
8 Carolina, ---

9 MR. KENDALL: I believe that he, uh, ---

10 THE COURT: --- we can give 'em both ---

11 THE DEFENDANT: Okay, but I'm not sure.

12 THE COURT: --- if we can agree.

13 (Whereupon, a discussion was held off the record.)

14 MR. KENDALL: No, that was what Detective -- what
15 Detective Beck testified to was he he was notified on the 12th
16 and went out there the 13th, that that was, that was his
17 testimony, uh, ---

18 THE COURT: I can't hear ya, speak up.

19 MR. KENDALL: It was the -- Detective Beck's testimony
20 was, Your Honor, was that he was notified on the 12th and went
21 out there on the 13th of December.

22 THE COURT: That's when he called Mr. Beck ---

23 MR. KENDALL: Yes, sir.

24 THE COURT: --- who -- who's with Spartanburg County.

25 MR. KENDALL: Yes, sir.

MOTIONS AND MATTERS

1 THE COURT: Can we agree to that?

2 THE DEFENDANT: I I believe we can yes, Your Honor.

3 THE COURT: Alright, so the date that he called
4 Spartanburg County was the 12th.

5 THE DEFENDANT: Yes.

6 THE COURT: The date Tinsley, Jr. made statement to law
7 enforcement and you said there was only one statement put into
8 the record.

9 MR. KENDALL: I believe that was December 7th. It might
10 have been December 6th cuz' I remember asked about ---

11 THE COURT: Let's get ---

12 MR. KENDALL: --- this and ---

13 THE COURT: --- it right.

14 MR. KENDALL: Yes, sir, it's it's on the toppa that,
15 toppa that statement, um, ---

16 (Whereupon, a discussion was held off the record.)

17 MR. KENDALL: Yeah, that's the only one we, that's the
18 only one we talked about the 5th of December 2006.

19 THE DEFENDANT: Did you introduce the statement already?

20 MR. KENDALL: No, no, we never, we never introduced into
21 evidence. Detective Beck testified to it cuz' it was right
22 after when we asked him, I asked him, Detective Beck, how many
23 days is it between 5th and the 12, and he went, One day and I
24 went, um...

25 THE DEFENDANT: So there there was testimony of -- from

MOTIONS AND MATTERS

1 Beck and Detective White. Detective White -- Detective Beck
2 questioned me about the three campers that was from North
3 Carolina and then on the ---

4 THE COURT: But was that, was that put into evidence? We
5 kept the North Carolina statement out I thought.

6 THE DEFENDANT: That's what, that's what we -- it --
7 that's what my position was it was supposed to be out but the
8 but ---

9 THE COURT: Well I think ---

10 THE DEFENDANT: --- he did, ---

11 THE COURT: --- it stayed out.

12 THE DEFENDANT: --- he did tes -- huh?

13 THE COURT: I don't think that came in.

14 THE DEFENDANT: Okay well then then it's not. Then it
15 was Detective White. I know his came in cuz' I asked him
16 specifically, Didn't you ask me about this ---

17 THE COURT: Yes, sir, but ---

18 THE DEFENDANT: --- camper and I --- and so this
19 Detective White was ---

20 MR. KENDALL: I believe ---

21 THE COURT: Are there two different statements, Mr. ---

22 MR. KENDALL: There's an official statement. In other
23 words, he was talkin' to law enforcement, we -- we're going
24 off of it was December 5th. He gave a ---

25 THE COURT: Was he as --

MOTIONS AND MATTERS

1 MR. KENDALL: --- statement ---

2 THE COURT: --- was he asked about both statements?

3 MR. KENDALL: Um, ---

4 THE COURT: I don't know that we're going to be able to
5 do this. Obviously we're havin' problems.

6 MR. KENDALL: With respect to this statement, Your Honor,
7 this one was definitely given December 5th. Mr. Tinsley asked
8 Detective White at a later time if he had ever, if he had
9 ever -- if he had told him that the thing ---

10 THE COURT: When did that happen?

11 MR. KENDALL: Uh, ---

12 THE DEFENDANT: The the day after when they came, when
13 they came and seized the camper from my dad is the testimony I
14 believe ---

15 THE COURT: And what day was that?

16 THE DEFENDANT: That was the 13th and I was in Henderson
17 County Jail as we all know. They came up there, it was back
18 there the next day and interviewed me up there and that's when
19 he asked me, Where'd you get this camper and I said that I got
20 it from Bill Dotson.

21 MR. KENDALL: I believe that's that's what he testified
22 to, Your Honor. I believe that's correct was what Detective
23 White testified to was that a day or two after Mr. Tinsley was
24 arrested he went to and talked to so I I I will, I will
25 agree ---

1 THE COURT: I I I can't speculate on these things.

2 MR. KENDALL: Yes, sir. Now I, I mean, I would, I would
3 agree to the that the first one was done December 5th to
4 Detective Beck, he spoke to Detective White on December 14th.
5 I I would, I would, I would stipulate to that. I don't know
6 how he put that into -- like I don't know how that was into
7 evidence the first time. I know Detective Beck specifically
8 testified to talking to Mr. Tinsley on the 5th, that was in
9 our direct examination. I don't know how Mr. Tinsley -- I
10 don't remember off the top of my head how Mr. Tinsley
11 discussed it with Detective White.

12 THE COURT: Alright, here's what I have: that as to when
13 the off-duty officers went to the vehicle there was no
14 specific date given; as to when the camper was reported
15 missing, I think he stipulated October 12th 2006; as to when
16 the camper was moved to grandmother's, December 2nd 2006; as to
17 the date Tinsley, Sr. called law enforcement, he called
18 Spartanburg County on December 12th of '06; as to the date of
19 Tinsley, Jr. statements, he made a written statement to
20 Detective Beck on 12/5 and gave a verbal statement to
21 Detective White on 12/14.

22 MR. KENDALL: I would think we'd wanna refer to them both
23 as verbal statements, Your Honor. He did not sign the first
24 one.

25 THE COURT: Okay, so he gave two statements ---

MOTIONS AND MATTERS

1 MR. KENDALL: Yes, sir.

2 THE COURT: --- verbally; ---

3 MR. KENDALL: Yes, sir.

4 THE COURT: --- one to Beck on the 5th, ---

5 MR. KENDALL: Yes, sir.

6 THE COURT: --- one to White on the 14th.

7 MR. KENDALL: Yes, sir.

8 THE DEFENDANT: But just that everybody knows that the
9 one on the 5th had -- didn't have to do with this camper. I
10 wasn't questioned about this camper, it ---

11 THE COURT: They're not askin' what they were about.

12 THE DEFENDANT: Alright.

13 THE COURT: Now if you object to me giving them any
14 dates, tell me now either of ya.

15 MR. KENDALL: No objection from the State, Your Honor.

16 THE DEFENDANT: I would object, Your Honor.

17 THE COURT: Okay, then I'll just tell 'em it's it's
18 available in the testimony. If they need to listen to the
19 testimony, we'll play it all again. Alright. They do wanna
20 hear the testimony from Tinsley, Sr. We'll take a short break
21 while you retrieve that tape.

22 THE DEFENDANT: Your Honor, are they specifying whether
23 it was his testimony for the defense or his testimony for
24 the ---

25 THE COURT: It says, Mr. Tinsley, Sr., would like his

1 testimony today's and yesterday's.

2 THE DEFENDANT: Okay.

3 THE COURT: We plan to play it all. I plan to play it
4 all if that's what they want.

5 (Whereupon, a recess was taken.)

6 THE COURT: Bring 'em in.

7 (The following takes place in the presence of the jury.)

8 THE COURT: Alright, ladies and gentlemen of the jury,
9 I've received your questions and let me go over these with
10 you. First of all, you asked for some dates. I told you
11 earlier that I'm not allowed to comment on your decisions
12 concerning the facts so I'm not able to supply you with facts
13 concerning the matter. You were all present, heard the
14 testimony and of course you will be required to decide the
15 case based on your recollection of the testimony so I can't
16 comment as to provide you facts or dates or anything of that
17 nature, the testimony is what it was and it was presented
18 during the trial.

19 As to Mr. Tinsley, Sr.'s testimony, you may have noticed
20 that we had a change in court reporters from the first day to
21 the second, they use different equipment. We would be able to
22 play today's testimony but not yesterday's testimony on the
23 equipment that's available because they play at different
24 speeds. We can't play the two tapes and in the interest of
25 completeness I will not play one without playing both so I

1 will not be able to provide that testimony to you. Again,
2 I'll ask you to to deliberate among yourselves and reach a
3 consensus as to what that testimony was, I'll not be able to
4 play the entire testimony to you so I can't respond to your
5 questions. I'll ask you to retire to the jury room, continue
6 your deliberations. Let me before you go back if
7 deliberations continue past five o'clock, I'll send the clerk
8 in to get information as to who we should call to let people
9 know that you're here and in the process of working on a case
10 so that people don't think you've been kidnapped or or
11 somethin's happened to you. We'll advise people of your
12 presence and what's going on as far as you're concerned so if
13 the clerk comes in for that purpose please suspend
14 deliberations while the clerk is there, give whatever
15 information is needed for those calls to be made and then once
16 the clerk has left you can resume your deliberations. If we
17 go later into the evening, if we get into ordering dinner,
18 I'll bring you back in for different instructions as far as
19 that is concerned as well. At this time I'll ask you to
20 retire to the jury room to continue deliberations.

21 (The following takes place outside the presence of the
22 jury.)

23 THE COURT: Any objection to my response from the State?

24 MR. KENDALL: No objections, Your Honor.

25 THE COURT: Any from the defense?

MOTIONS AND MATTERS

1 THE DEFENDANT: No, Your Honor.

2 THE COURT: Alright, this inquiry will be made a court's
3 exhibit, made part of the record. We'll remain in recess
4 until such time as a verdict's reached.

5 (Note from jury marked Court's Exhibit No. 3.)

6 (Whereupon, a recess was taken.)

7 (Whereupon, a verdict was reached at 4:40 p.m.)

8 THE COURT: I'm informed we have a verdict.

9 (Whereupon, a discussion was held off the record.)

10 (Pause.)

11 THE COURT: Alright, is the State ready to receive a
12 verdict?

13 MR. KENDALL: The State's ready, Your Honor.

14 THE COURT: Defense ready? Is the defense ready?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Bring the jury in.

17 (The following takes place in the presence of the jury.)

18 THE COURT: The record will reflect the jury has returned
19 to the courtroom. Madam forelady, I'm informed a verdict has
20 been reached, is that true?

21 THE JURY FORELADY: Yes, sir.

22 THE COURT: If you'll pass the form to the bailiff for
23 me.

24 (Whereupon, the jury forelady complied.)

25 THE COURT: Thank you, ma'am. Madam clerk you may

VERDICT

1 publish the verdict.

2 THE CLERK: The State of South Carolina the County of
3 Spartanburg in the Court of General Sessions the State of
4 South Carolina vs. James Tinley [sic] Jr., Case No.
5 2007-GS-42-5031 as to the Indictment No. 2007-GS-42-5031 for
6 receiving stolen goods, we, the jury, unanimously find the
7 defendant, James Tinley -- Tinsley, Jr., guilty, signed by the
8 foreperson the 10th day of November 2010. Ladies and
9 gentlemen of the jury, is this your verdict and still your
10 verdict if so please raise your right hand.

11 (Whereupon, the jury panel raised their hands.)

12 THE CLERK: So say you all.

13 THE COURT: Anything further from the State before I
14 release the jury?

15 MR. KENDALL: Nothing further, Your Honor.

16 THE COURT: Anything further from the defense before I
17 release the jury?

18 THE DEFENDANT: No, Your Honor.

19 (Whereupon, the jury was released.)

20 THE COURT: Did you get the indictments yet?

21 THE CLERK: Yes, sir, that's just ---

22 THE COURT: Anything further from the State at this point
23 in time?

24 MR. KENDALL: Nothing further, Your Honor.

25 THE COURT: Anything further from the defense?

MOTIONS AND MATTERS

1 THE DEFENDANT: Yes, Your Honor. I would move to set
2 aside the verdict of the jury or for a new trial. There was
3 no everence -- evidence in the record to support the jury's
4 verdict. The evidence at best raised only a mere suspicion a
5 guilt which was insufficient to convict. No rational trier of
6 fact coulda found guilt beyond a reasonable doubt. The jury
7 must have con -- been confused about the law and and this
8 application to these facts. I believe the jury came to this
9 verdict by stacking inference upon inference. The jury must
10 have misunderstood your charges and believed that my mere
11 proximity to the stolen goods constitutes possession and based
12 upon this erroneous belief in possession determined that I I
13 also had knowledge of its stolen character based upon this
14 unsupported circumstantial evidence alone.

15 THE COURT: Denied. Alright, you'll prepare the
16 sentencing sheet for me.

17 MR. KENDALL: Got that, Your Honor.

18 (Whereupon, a discussion was held off the record.)

19 MR. MCCARTY: Your Honor, I don't know if for the purpose
20 of any future record, and I don't wanna put Ms. Price in any
21 typa situation down the road, but if maybe if she would at
22 least initial someplace that she was the appointed advisor for
23 the purpose so that we don't get into ourselves a pro se
24 representation in a future case down the road.

25 THE COURT: If you don't mind, Ms. Price, put a note on

MOTIONS AND MATTERS

1 the sentencing sheet ---

2 MS. PRICE: Certainly.

3 THE COURT: --- un -- under that that you served as -- in
4 the capacity that you served in in this case, ---

5 MR. MCCARTY: Thank you, Your Honor, that would only
6 be ---

7 THE COURT: --- some I think it's referred to under the
8 case as a standby attorney.

9 MR. MCCARTY: Just in case we have --- what we had out of
10 Oconee County we'll know for ---

11 THE COURT: I understand.

12 MR. MCCARTY: --- certain.

13 MS. PRICE: I signed it standby counsel, Your Honor,
14 under under my name and my ---

15 THE COURT: Thank ---

16 MS. PRICE: --- bar number.

17 THE COURT: --- thank you very much. Any of the jurors
18 are they comin' around for sentence?

19 THE BAILIFF: No, sir.

20 THE COURT: Okay.

21 MR. KENDALL: Your Honor, I'm handing up the sentencing
22 sheet and also a restitution order.

23 THE COURT: Alright, if you'll pass that up. I'll ask,
24 Mr. Tinsley, if you'll please approach, stand in the center
25 here (indicating) where the microphone is. Thank you.

MOTIONS AND MATTERS

1 Mr. James Tinsley, Jr. you have been found guilty by a jury of
2 your peers. At this point in time, the question of sentencing
3 is before the Court. I'll be happy to hear from you
4 concerning any information that you feel that I should
5 consider in that regard.

6 THE DEFENDANT: Okay, Your Honor, I obviously maintain my
7 innocence on this particular charge. The jury has spoken and
8 that issue is no longer relevant. I would ask that you, the
9 Court consider some community supervision rather than a
10 lengthy sentence. If the Court's conscience will not allow
11 you to do that, I would ask that any potential sentence be ran
12 concurrent to my sentence I am already serving and be back
13 dated to begin when that sentence began. I do not believe
14 that I'm the type of person who needs a a lengthy sentence.
15 I've already learned that I should choose my friends more
16 carefully. My poor judgment when it comes to choosing friends
17 stems from the fact that I don't have a lot of experience with
18 friends and I tend to trust 'em too much I believe and I've
19 proven that I can be successful in society. I've held down a
20 good job and supported myself and the whole family for many
21 years. I believe it would be better to serve me and the
22 victim if the -- if if there was a suspended concer --
23 concurrent sentence with a PTUP or somethin' so that they
24 could get restitution. I believe there's like 5 or \$6,000 in
25 restitution.

MOTIONS AND MATTERS

1 THE COURT: The order that's been submitted to me is
2 \$2366.89.

3 MR. KENDALL: That's correct, Your Honor, that was, that
4 was based on what was was put into evidence they did ---

5 THE COURT: The work order for ---

6 MR. KENDALL: --- before ---

7 THE COURT: --- the ---

8 MR. KENDALL: Yes, sir.

9 THE COURT: --- repairs that was necessary.

10 MR. KENDALL: Yes, sir, as it relates to to this camper.

11 THE COURT: Yes, sir, you can continue, I didn't mean to
12 interrupt.

13 THE DEFENDANT: That's okay. I would also add that my
14 co-defendant received a six-month sentence for a -- the theft
15 of the RV that came from the same camper store. He had a very
16 long record and of course he pled guilty and I'm sure that
17 some -- was some kind of a consideration but I don't believe
18 that I should be punished more harshly, you know, because I
19 wanted to exercise my right to a jury trial. No new or more
20 heinous information came in during this trial that wasn't
21 known in that plea deal and I realize that I've been extra
22 work and aggravatin' and cost the state extra money and I I
23 fully expect to pay, you know, the extra court costs and all
24 that for it and other than that I would put myself in your
25 hand.

MOTIONS AND MATTERS

1 THE COURT: He's referring to a co-defendant.

2 MR. KENDALL: This this was a co-defendant in that RV
3 case, Your Honor.

4 THE COURT: Um-hum.

5 MR. KENDALL: As I understand this, this is, this in a
6 police report or anything like that, the co-defendant was pled
7 to it be #0:14:10.7(17) time served and sent to North Carolina
8 to deal with charges up there, that that was my understanding
9 of it is there was an extradition, a guilty plea to extra --
10 to get dition. I believe that that was -- again, and Ms.
11 Price has better information on that.

12 MS. PRICE: Your Honor, I could probably shed a little
13 light on this.

14 THE COURT: Alright.

15 MS. PRICE: I currently am standby counsel for
16 Mr. Tinsley on two charges. They both stem from the same date
17 but they're two separate charges; one was the receiving stolen
18 goods for this trailer camper type thing, the other one was a
19 grand larceny of an actual RV. As you've heard in the
20 testimony and during the arguments, that RV was
21 subsequently found up in Cherokee, North Carolina. He did
22 have a co-defendant on that, Mr. Hogan Hugh Justice. Your
23 Honor, Mr. Justice received a sentence of a hundred and
24 twenty-five days suspended to time served but he had an
25 additional hold on him from Ruth -- I believe Rutherford

MOTIONS AND MATTERS

1 County, North Carolina. At that point he was transferred from
2 our jail up to North Carolina on those charges, they did have
3 a a hold on him, so that is the reason for that sentence in
4 that matter.

5 THE COURT: I understand. Now anything further?

6 THE DEFENDANT: Not from me. I don't know if anyone else
7 wants to speak on ---

8 THE COURT: Well no, sir, I'll -- if someone wants to
9 speak on your behalf, I'll hear from them. Anyone here to
10 speak on his behalf? Sir, if you'll come forward over here
11 (indicating) to the right, the left corner as far as you're
12 concerned. And I already know that you're Mr. Tinsley,
13 Sr., ---

14 MR. TINSLEY, SR.: Yes.

15 THE COURT: --- so I'll be happy to hear from you.

16 MR. TINSLEY, SR.: Well, Judge, I would only ask that you
17 be as merciful as your conscience will allow. I believe James
18 has promise. He's -- he doesn't have the same problems that a
19 lot of young men have: no alcohol, no drugs, it's -- he's
20 extremely talented, fantastic machinist, can earn a good
21 living. He -- he's done some stupid things, some thoughtless
22 things, some things that probly sounded like a good idea at
23 the time but a few weeks ago he called me and he said, Dad, I
24 finally figured out what you've been trying to tell me. And,
25 Judge, I told him the same thing my dad told me, You won't

MOTIONS AND MATTERS

1 ever have any problems if you avoid questionable people,
2 places, and things, if you avoid those three things you'll do
3 fine. I believe he failed to do that in the case that's
4 before ya. Whether or not he has truly learned that lesson or
5 not I guess time will tell but with all due respect to the
6 Court I think this is one of those situations where the
7 scriptural principles concerning restitution where restitution
8 is possible are not in conflict with the Court or with the
9 laws of our state and I would just ask that you be as merciful
10 as you can and hopefully he can lead a productive life as a
11 good citizen after he's completed the sentence that he's
12 currently servin'.

13 THE COURT: Thank you, sir.

14 MR. TINSLEY, SR.: Thank you, sir.

15 THE COURT: Yes, sir, you're welcome. Mr. Tinsley, the
16 current sentence that you're serving was out of Oconee County,
17 is that correct?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: And that sentence is?

20 THE DEFENDANT: Fourteen (14) years.

21 THE COURT: And when is the max out date?

22 THE DEFENDANT: I'm not sure when the max out date is,
23 Your Honor.

24 THE COURT: Subject to parole? When are you eligible for
25 parole?

MOTIONS AND MATTERS

1 THE DEFENDANT: I believe 2012 I believe.

2 THE COURT: Alright, sir. I'll hear from the State.

3 MR. KENDALL: Your Honor, I I have the the totality of
4 the sentence that he's currently serving. The admission date
5 on that was 8/20/2008 with a ---

6 (Whereupon, a discussion was held off the record.)

7 MR. KENDALL: Okay. The max out date is is April 14,
8 2016 with a parole date of September 11th 2012. Mr. Tinsley
9 is currently right now his bond has never been revoked from
10 this case for what that's worth to DOC. Um, um, ---

11 THE COURT: When was he served with a warrant in this
12 case?

13 THE DEFENDANT: I can tell ya. It was, it was -- arrest
14 date was June 17th 2007.

15 THE COURT: Does that sound right to you, Mr. ---

16 MR. KENDALL: It does.

17 THE COURT: --- Kendall?

18 MR. KENDALL: Let me double check it. They have
19 6/18/2007 is what, uh, is the copy I've got.

20 THE DEFENDANT: Eighteen (18) rather than seventeen (17).

21 MR. KENDALL: We also have his bond sheet, Your Honor, if
22 you'd like us to pass that up.

23 THE COURT: Now he bonded out at that time?

24 MR. KENDALL: He did bond out at that time, Your Honor,
25 and from ---

MOTIONS AND MATTERS

1 THE COURT: And when was he reincarcerated?

2 THE DEFENDANT: January 29th, January 29th 2008.

3 THE COURT: And you've been incarcerated since then?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Alright. Prior record?

6 MR. KENDALL: Prior record, Your Honor, 1988 unlawful
7 racing on a public road, 1989 grand l -- or excuse me,
8 receiving stolen goods, 1990 financial transaction card fraud,
9 a YOA I believe that was.

10 THE DEFENDANT: They're all misdemeanors as well.

11 MR. KENDALL: 1990 a failure to appear during probation,
12 1991 fraudulent check, 1992 a series of one, two, three, four,
13 five, five counts of fraudulent ch -- excuse me six counts of
14 fraudulent check that was suspended on payment of restitution,
15 1992 for another fraudulent check, another fraudulent check in
16 1992, Your Honor, a 1993 a petty larceny and 2008 the
17 receiving stolen goods for which he's currently incarcerated
18 in from Oconee County. I believe that is the entirety of it,
19 Your Honor.

20 THE COURT: Mr. Kendall, the charge in Oconee County does
21 that grow out of this same series of transactions or was that
22 a different transaction?

23 MR. KENDALL: I I don't believe that this this is -- it
24 was the some of the same characters were in that ma ---

25 THE COURT: I'm not ---

MOTIONS AND MATTERS

1 MR. KENDALL: --- in that ---

2 THE COURT: --- yeah, I'm not concerned about characters,
3 I'm wondering is this the, is this the Holiday Kamper heist
4 or ---

5 MR. KENDALL: I I ---

6 THE COURT: --- is this ---

7 MR. KENDALL: --- don't believe this is, this is not
8 Holiday Kamper to the best ---

9 THE COURT: This is some ---

10 MR. KENDALL: --- of my knowledge, Your Honor.

11 THE COURT: --- other ---

12 MR. KENDALL: Yes, sir. Yes, sir, I believe it was a
13 Polaris dealership if I'm not mistaken.

14 THE COURT: Alright. The date of the conviction in
15 Ocone?

16 MR. KENDALL: I've got the admission date of Ocone.
17 Actually, I do have the conviction date, Your Honor. Give me
18 one moment. I don't know if I have the copy Ocone County.
19 It was 8/20/2008. Does that, does that sound -- that's the
20 date that I have on his -- on the rap sheet, Your Honor. That
21 was the admission date into DOC I believe.

22 THE DEFENDANT: I think it was 8/19 is probly ---

23 THE COURT: Can you look him up on the DOC site? It
24 should have date of ---

25 MR. MCCARTY: It is, it is, Your Honor, that's the date

SENTENCE

1 from admission from the DOC website is 8/20/2008, that's
2 where ---

3 THE COURT: 8/20?

4 MR. MCCARTY: --- we received that information.

5 (Whereupon, a discussion was held off the record.)

6 THE DEFENDANT: Judge, the the admission date that's
7 probly right the 8/20/2008. The actual conviction date I
8 believe is gonna be July 29th but I had a car accident ticket
9 and they held me at the jail for the two or three more weeks
10 or nineteen (19) days or whatever it was to have that hearing
11 and that's the reason I didn't get to admission until the 20th
12 of the the following month. I don't know if that makes any
13 difference but ---

14 THE COURT: Alright, Mr. Tinsley, since this is --
15 appears to be a separate incidence I'm gonna treat it as such.
16 I'm not unmindful of the fact that you received a substantial
17 sentence in similar transactions already and that's the reason
18 that my sentence is somewhat lower than perhaps it would
19 normally be in the situation as far as active time is
20 concerned; however, it is concerning to the Court that it
21 appears that you have involved yourself in a series of these
22 transactions or at least two that you've been convicted of but
23 I understand that there may be another charge pending but I'm
24 not considering that in reaching a verdict in this particular
25 case or reaching a sentence in this particular case, I'll let

SENTENCE

1 that take care of itself. The sentence in this case is ten
2 (10) years. I have suspended that to service of three (3)
3 with probation for five (5). I'll run it consecutive to the
4 sentence that you're already running to allot additional time
5 to your active sentence. Probation will begin upon your
6 release on all active sentences that you might have. I'm
7 running the probation so that you might be in a position to
8 pay the resti -- restitution to the victim which is
9 twenty-three hundred and sixty-six dollars and eighty-nine
10 cents (\$2366.89). After four (4) years of probation if you're
11 able to complete your restitution and abide by all terms and
12 conditions, I have provided for a PTUP at that time. Good
13 luck to you, sir.

CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on November 10, 2010 at the time and place heretofore set forth; and that the foregoing pages numbered from 5 through 158, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

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

February 14, 2011

Margaret A. Woods

Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

ORIGINAL

2014-CP-42-384

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)JAMES TINSLEY, # 171943)
Full name and prison number (if any) of Applicant.)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Livesay C.I., P.O. Box 580, Una, S.C. 29378
2. Name and location of Court which imposed sentence SPARTANBURG COUNTY
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 07-GS-42-5031
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 10, 2010
 - (b) _____

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- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Yes _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals _____
- ii. South Carolina Supreme Court _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction upheld _____
- ii. Certiorari Denied _____
- iii. _____
- (c) the date of each such result:
- i. December 5, 2012 _____
- ii. January 8, 2014 _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A _____
- ii. N/A _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) SEE ATTACHED
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. N/A
- ii. _____
- iii. _____

ISSUES

I. APPLICANT WAS DENIED A FAIR TRIAL WHEN THE TRIAL JUDGE FAILED TO DIRECT THE VERDICT WHERE THE EVIDENCE DID NOT ESTABLISH THAT THE "STOLEN GOODS" WERE RECEIVED OR POSSESSED ON OR ABOUT THE EXACT DATE OF THE INDICTMENT.

According to the indictment (07-GS-42-5031) the State alleged that the Applicant received the stolen camper on or about October 11, 2006. The evidence offered by the State indicates that if Applicant received or possessed the stolen camper, he did so on December 2, 2006. (Tr. Trans. pgs. 205, lns. 11- pg. 206, ln. 3). No evidence was introduced to suggest that Applicant received or possessed the stolen camper before December 2, 2006 and certainly not on or about the date alleged in the indictment.

To be guilty of receiving stolen goods, the State must prove the elements that the defendant bought, received or possessed the stolen goods, knowing them to have been stolen. State v. Hicks, 314 S.C. 280, 443 S.E.2d 907 (1994); S.C. Code, § 16-13-180 (Supp. 1993). However, receiving stolen goods is not a lesser included offense of larceny because receiving stolen goods requires the inclusion of an element not included in larceny, particularly, that the goods must be stolen by another. State v. McNeil, ___ S.C. ___, 445 S.E.2d 461, 462 (1994).

Most importantly, receiving stolen goods ends the moment the goods are received and is not a continuing offense. State v. Rountree, 80 S.C. 387, 61 S.E. 1072 (1908) (knowledge must exist at the moment the goods are received). Receiving stolen goods does not follow a person in time or from County to County

as does larceny. State v. Henderson, 285 S.C. 320, 329 S.E.2d 448 (1985); State v. Vareem, 223 S.C. 34, 74 S.E.2d 223 (1956); State v. Rutledge, 232 S.C. 223, 101 S.E.2d 289, 67 A.L.R. 2d 747 (1957)(larceny is a continuing offense).

For these reasons, in order to establish this crime and to have defeated the directed verdict motion, the State must have proven that the goods were received or possessed in a single transaction that allegedly occurred on October 11, 2006.

The State failed to establish that the Applicant received or came to possess the stolen camper through any transaction occurring on that date. The transaction, if any, occurred months later on or about December 2, 2006 and constitutes a separate and distinct transaction from that alleged in the indictment.

If Governments argument and evidence broadens the basis for a conviction beyond those in the indictment, it constitutes a "constructive amendment" or "fatal variance" which violates the Fifth Amendment right to be indicted by a grand jury. United States v. Mason, 41 Fed. Appx. 612 (CA 4th SC 2002).

Since receiving stolen goods is not a continuing offense, as is larceny, the State may not maintain a conviction for receiving stolen goods that occurred months later and in another County from that set forth in the indictment. For these reasons, directed verdict should have been granted, Applicant was denied a fair trial and his rights to be indicted by a grand jury were denied him. (Supplemental Tr. Trans. pg. 59, lns. 5-25).

II. APPLICANT WAS DENIED A FAIR TRIAL WHEN THE TRIAL JUDGE REFUSED TO DIRECT THE VERDICT WHERE THE EVIDENCE REQUIRED THE JURY TO STACK INFERENCES UPON INFERENCE AND THE COURT LACKED VENUE.

At the close of the State's case, the Applicant moved for directed verdict of acquittal based upon insufficient evidence and the lack of venue. (Tr. Trans. pgs. 347, lns. 19- pg. 348, ln. 24). Applicant contended that if the charge were not dismissed, the State would be allowed to build its case by stacking the inference of guilty knowledge on top of the inference of possession based upon circumstantial evidence that Bill Dotson told two police officers that Applicant owned a "trailer" located on Mr. Dotson's property that had similar graphics as those later discovered on a stolen "camper".

The evidence at trial demonstrated that a camper was stolen from Holiday Kamper on or about October 12, 2006. (Tr. Trans. pg. 179, lns. 5-13). In this case, it is important to understand the distinctions between a "camper" and an "enclosed trailer". A "camper" contains living quarters, bath rooms and kitchens while the "enclosed trailer" does not and is typically used to haul lawnmowers or motorcycles. (Sup. Tr. Trans. pgs. 56, ln. 25- pg. 57, ln. 8). The Applicant owned an "enclosed trailer" that contained identical stickers and graphics as those found on a stolen "camper". (Tr. Trans. pgs. 23, lns. 13-20; pg. 63, lns. 11-17; and pgs. 307, lns. 24-pg. 308, ln. 6).

Applicant had used the "enclosed trailer" in the go-kart racing industry and later traded it in on the "camper" to also be used in the go-kart racing industry. This "camper" had a rear let down ramp door and could also be used to haul go-karts.

As a result of their use, both the "camper" and the "enclosed trailer" had Applicants personal, identical go-kart racing stickers, graphics and racing numbers. The "enclosed trailer" and "camper" were so similar that Applicants father had trouble recognizing the difference. (Tr. Trans. pgs. 206, lns. 22-pg. 207, ln. 12; pg. 220, lns. 18-23; and pg. 226, lns. 2-25).

Applicant sold some of his machines to Rick Jackson for \$10,000.00 and traded in his "enclosed trailer" worth an additional \$10,000.00 to Bill Dotson for the "camper" that was later discovered to have been stolen. (Tr. Trans. pgs. 222, lns. 13-pg. 223, ln. 4).

Apparently, Bill Dotson took the "enclosed trailer" to his shop in Sparatanburg, South Carolina and attempted to sell it for \$10,000.00 - the approximate value of the "trailer". Two police officers heard about the "trailer" and went to look at it but were not interested because it would not haul an automobile. (Tr. Trans. pgs. 296, lns. 21-pg. 297, lns. 2 and 16-19). The trial judge must have believed that the officers had looked at the stolen "camper" and thus because it was at Mr. Dotson's shop in Spartanburg, the State had established venue. The officers did not describe the trailer as having living quarters inside and therefore they must have been looking at the "enclosed trailer" and not the stolen "camper".

Bill Dotson told the officers that the "trailer" belonged to Applicant. (Tr. Trans. pgs. 301, lns. 21-pg. 302, ln. 5). Upon information and belief, Mr. Dotson told police the "trailer" belonged to Applicant in an attempt to have the officers leave his property. It is believed that Mr. Dotson was involved in

illegal activities, including stealing numerous "campers" from North Carolina and was using this tactic to make the officers leave his property. Mr. Dotson immediately left the area and has not been located since. (Tr. Trans. pg. 316, lns. 4-11). The "enclosed trailer" had identical stickers as those that were later discovered on the stolen "camper". (Tr. Trans. pgs. 307, lns. 24-pg. 308, ln. 3). The officer testified that he was unaware that Applicant had an enclosed "trailer" with identical stickers on it. (Id.).

Detective Beck testified that they were investigating other stolen campers that had been taken from Hendersonville, North Carolina. (Tr. Trans. pg. 340, lns. 4-15). Ben Lindler testified that Applicant had told him that two black men had stolen "a" camper for him. (Tr. Trans. pgs. 254, ln. 19-pg. 255, ln. 1).

The Applicants father, Doug Tinsley, testified that the Applicant brought the camper to his mothers (Applicants Grandmothers') home next door to his residence in Greenville, South Carolina. (Tr. Trans. pgs. 205, lns. 23-pg. 206, ln. 3). He testified that he asked Applicant what happened to his other "enclosed trailer" and that Applicant said that he had traded it in with Bill Dotson on the "camper". (Tr. Trans. pg. 226, lns. 8-17). He also testified that a few days later, in an unrelated matter, (the investigation of stolen campers from North Carolina), he began to question whether the "camper" could be stolen. He testified that he spoke with Applicant and asked him if he thought that the "camper" at his Grandmothers' might be stolen. He testified that Applicant told him that he did not believe that it was stolen, but admitted that it was possible and that the right thing to do would be to contact police and have it

checked out. (Supp. Tr. Trans. pgs. 16, lns. 22-pg. 17, ln. 14; pgs. 35, lns 7-pg. 36, ln.21).

Following the investigation stemming from that inquiry, it was ultimately determined that the "camper" was stolen from Spartanburg, South Carolina. Detective Wight testified that he interviewed the Applicant and asked him where he had obtained the "camper" and that Applicant said that he was selling some machines for \$ 10,000.00 and had traded his "enclosed trailer" with Bill Dotson for the "camper". (Tr. Trans. 325, lns. 17-25).

During cross-examination, every witness for the State admitted that: (1) they were not present when the camper was stolen and did not see or have knowledge of who stole it; (Tr. Trans. pgs. 209, lns. 6-11; pgs. 330, lns. 15- pg. 331, ln. 14); (2) they were not present when the "camper" was received and could not testify to who received the camper, where or in what County it was received or what information was given to the receiver; at that time; (Tr. Trans. pg. 209, lns 12-16); and (3) they never saw the Applicant in possession of the "camper" in Spartanburg County, either at Upstate Signs (Bill Dotsons Shop) or at Applicants home in Inman. (Tr. Trans. pgs. 276, lns. 13-pg. 278, ln. 20).

Although Applicant admits he brought the camper to his Grandmothers home in Greenville County, there was no evidence, testimony or witnesses who claim Applicant drove to Spartanburg County and picked up the camper in that jurisdiction.

The Applicant contends that at the time the "camper" was recovered, he was in the Henderson County Jail in North Carolina,

(Tr. Trans. pg. 34, lns. 17-20), and therefore there was no "actual" possession of the camper. The possession of the camper at most would have been constructive, based upon the fact that Applicant visited his Grandmothers, had brought the camper to that location and presumably had control over it and its content.

To convict Applicant, the jury would have to "infer" that Applicant received or possessed the camper in Spartanburg County simply because the circumstantial evidence suggests he had dominion and control over the camper in Greenville County and then "infer" Applicant had "knowledge" of the campers stolen character based upon the "inferred" receipt or possession of the "camper" in a County other than that listed in the indictment.

Simply put, the jury was forced to "infer" that because Applicant brought too or possessed the camper at his Grandmothers in Greenville County, that he must have driven all the way to Spartanburg and received or possessed it there when picking it up. The problem is there is no evidence that Applicant drove to Spartanburg to pick up or receive the "camper".

The trial judge apparently believed that knowledge that the camper was stolen had been established because Ben Lindler testified that Applicant told him that two black men had stolen "a" camper for him. Mr. Lindler however, never testified that he saw the camper the two black men allegedly stole and did not identify "this" camper as being the "same" camper allegedly stolen by the two men. (Tr. Trans. pg. 278, lns. 13-16). The evidence at trial demonstrated that numerous campers had been stolen along with RV's from several jurisdictions. (Tr. Trans. pgs. 340, lns. 4-pg. 342, ln.3). The two black men could have

stolen one of these "other" campers but not the one subject to this trial.

Therefore, even if this testimony is taken as being true, which we must do, it only requires the jury to stack yet another inference on top of all the others. Now they must "infer" that the camper the two black men allegedly stole is the "same" camper they are "inferring" Applicant possessed in Greenville County for which they are "inferring" that Applicant received in Spartanburg County at some point and that he had knowledge of its stolen character.

The trial judge also seemed to believe that the "possession" element and venue had been established because Bill Dotson told a police officer that the trailer on his property (bearing identical graphics as those found on the stolen camper) belonged to Applicant and this raises an inference that Applicant had dominion and control over the trailer in Spartanburg County. (Tr. Trans. pg. 352, lns 14-17).

This may have been sufficient had the "trailer" at Mr. Dotson's shop ~~been~~ the stolen "camper", but it is more likely that what police saw at Mr. Dotson's shop, was Applicant's "enclosed trailer" that he had traded in for the camper and for which was worth \$10,000.00, (Tr. Trans. pg. 226, lns. 8-17), and for which Mr. Dotson was trying to sell for \$10,000.00. (Tr. Trans. pgs. 296, lns. 21-pg. 297, ln. 2).

The stolen camper we must remember was in Greenville at Applicant's Grandmother's home. (Tr. Trans. pgs. 205, lns. 23-pg. 206, ln. 3). It was brought there on December 2, 2006. Officers were at Mr. Dotson's Shop looking at the "enclosed

trailer" on or **after** this December date. (Tr. Trans. pg. 299, lns 19-22). This required the jury to stack yet another inference on top of all the others. Now they must "infer" that the "trailer" seen at Dotson's shop was the stolen "camper" and not the "enclosed trailer". Then they must "infer" that Applicant possessed it and then "infer" Applicant had knowledge that it was stolen when Mr. Dotson had "equal access" to it.¹

The State did not establish venue. State v. Williams, 321 S.C. 327, 468 S.E.2d 626, 630 (1996)(a criminal defendant is entitled to a directed verdict when the State fails to present evidence that the offense was committed in the County alleged in the indictment). While it is true that some evidence existed that Applicant had dominion and control over a "trailer" at Mr. Dotson's shop in Spartanburg County, there was no substantial circumstantial evidence that that "trailer" was in fact the stolen "camper" subject to this action. The stolen camper was located in Greenville County, a County other than that listed in the indictment. The conjecture that the stolen "camper" was possessed in Spartanburg or that Applicant at some point traveled to Spartanburg to "receive" the stolen "camper" does not constitute sufficient evidence upon which guilt can be inferred, but rather, constitutes pure suspicion and speculation

¹ Assuming arguendo, that the trailer at Bill Dotsons shop was the stolen camper, the fact that Bill Dotson was the only person seen with the camper in Spartanburg County, demonstrates that Applicant did not have "exclusive" possession and if others have "equal access" the jury should not be allowed to "infer" that Applicant had dominion and control over the trailer at that location. State v. Maines, 273 S.E.2d 289, 294 (1981)(if situation is one where persons other than defendant have equal access to the stolen goods, the inference may not arise).

as to the guilt of Applicant and is insufficient to submit the case to the jury.

The elements of receiving stolen goods are that the goods must have been stolen and that the defendant must have bought them, received them or possessed them, in the County alleged in the indictment, and he must have knowledge that they are stolen. Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994); State v. Atkins, 32 S.E.2d 372 (1944); S.C. Code, § 16-13-180 (Supp. 1993). The State must prove every element of the offense charged. State v. Barksdale, 428 S.E.2d 498, 501 (1993). If there is a lack of evidence tending to prove the elements of the offense charged, State v. Stanley, 615 S.E.2d 455 (2005), or if there is a material variance between the charge and proof at trial, the defendant is entitled to directed verdict. State v. Jones, 536 S.E.2d 397 (2000). Evidence which raises a mere suspicion of guilt or could only require the jury to speculate as to the guilt of the accused, is insufficient to submit the case to the jury. State v. Ballenger, 470 S.E.2d 851, 853 (1996).

Most importantly, in circumstantial cases, the State may not prove guilt by stacking inference upon inference. State v. Gunn, 437 S.E.2d 75, 81 (1993); State v. Maines, 273 S.E.2d 289, 294 (1981) (inference may not be based upon inference. Every inference must stand upon some clear or direct evidence and not upon some other inference or presumption).

In this case, the evidence is simply too tenuous to permit a reasonable inference of guilt or to suggest that a rational jury could find guilt beyond a reasonable doubt. If Jackson

v. Virginia, 443 U.S. 307 (1970), beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence from historical facts reaches a certain degree or conjecture and speculation, then the defendant must be acquitted.

III. APPLICANT WAS DENIED HIS DUE PROCESS RIGHTS WHEN HE WAS CONVICTED BASED UPON EVIDENCE THAT POINTED EQUALLY TO GUILT AND INNOCENCE ON THE INDICTED OFFENSE.

At the close of the State's case, the Applicant moved for directed verdict of acquittal based upon insufficient evidence. The Applicant maintained that the evidence pointed equally to his guilt and to his innocence on the indicted offense and that it cannot be said that it is "more likely than not" that Applicant is guilty of the indicted offense and therefore a reasonable jury must necessarily entertain a reasonable doubt. (Tr. Trans. pgs. 344, ln. 8-pg. 346, ln. 25).

Ben Lindler testified for the State that the Applicant told him that two black men had stolen "a" camper for him. (Tr. Trans. pgs. 254, ln. 19-pg. 255, ln. 1). On cross-examination, Mr. Lindler admitted that he never saw the camper the two black men allegedly stole, (Tr. Trans. 278, lns 4-20), and no one during the trial identified "this" camper as being "the one" the two black men allegedly stole.

Detective Beck testified that "other" campers and RV's had been stolen from various jurisdictions that were separate from the investigation into this camper. (Tr. Trans. pg. 340, lns. 4-15). Therefore, it is equally possible that the two

black men did not steal "this" camper but rather one of the "other" campers mentioned during the trial. Thus, there was no evidence that "this" camper was received from "someone else who stole it".

On cross-examination of Detective Wight, he admitted that the Applicant could have stolen "this" camper himself. (Tr. Trans. pgs. 331, ln. 15-pg. 332, ln. 5). The evidence at trial therefore points equally to guilt and innocence on the indicted offense, because the evidence from the State suggests that the Applicant was a principal in the theft of the camper.

Under South Carolina Law, the rule is that "where a larceny has been committed, the principal thief, that is the one who is guilty of the actual caption and asportation, cannot be adjudged guilty of criminally receiving the thing stolen for the reason that he cannot receive from himself". State v. Hamilton, 174 S.E. 396, 397 (1934); State v. Tindall, 50 S.E.2d 188, 190 (1948)(if the evidence offered by the State shows that the defendant was the thief, then there can be no foundation for the verdict of the jury convicting him of receiving stolen goods. There can be no guilty reception unless there be a prior stealing by another); State v. McNeil, 445 S.E.2d 461, 462 (1994).

In this case the evidence demonstrated that the Applicant could have been the thief and could have been a receiver and if he be guilty as the thief, he cannot be convicted for receiving. Therefore, if the evidence points equally to Applicant's guilt and equally to his innocence on the indicted offense, then a reasonable jury must necessarily entertain a reasonable

doubt. Cosby v. Jones, 682 F.2d 1373, 1383 (11th Cir. 1982); State v. Cherry, 559 S.E.2d 297 FN 11 (Ct. App. 2001)(But if the court determines that the circumstances, alone or in combination, are equally constitent with innocence as with guilt, then the court has necessarily concluded that the evidence is incapable of providing a reasonable and logical basis for determining guilt. It is the obligation of the court in that instance to direct the verdict of acquittal). In Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213 (1979), the court clarified that this degree of inferential attenuation is reached at the least when the undisputed facts give equal support to inconsistent inferences.

IV. APPLICANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WHEN THE TRIAL JUDGE FAILED TO CHARGE THE JURY ON THE LAW AND TO INFORM THEM THAT THEY MUST FIND APPLICANT NOT GUILTY IF THEY DETERMINE THAT HE STOLE THE CAMPER HIMSELF.

Assuming arguendo, that there existed a sufficient dispute as to whether Applicant were the thief or a receiver to justify submitting the case to the jury, the trial judge failed to instruct the jury on the law surrounding the issues before them, or that they must return a verdict of not guilty, if they find that Applicant stole the camper himself.

Under Article V, §21 [formally §26] of the South Carolina Constitution, the trial judge has a duty to "declare the law", whether requested to do so or not, which means that he shall explain so much of the criminal law as is applicable to the issues made by the evidence. State v. White, 211 S.C. 276, 289-82, 44 S.E.2d 741, 743 (1947)(quoting State v. Durant, 87 S.C.

532, 70 S.E. 306-7 (1911).

Stating a legal conclusion which would result if the jury found certain facts, is not a charge on the facts. State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954). "The law is the right of a party arising out of a state of facts. A jury ought to be instructed about what right springs out of a fact to be determined by them. The jury ought not to be left to cut a way through the woods with no compass to guide them. Eaddy v. Jackson Beauty Supply Co., 136 S.E.2d 297 (1964).

Typically, the failure to request charges or to object to the charges given, does waive the right to complain about the charges. However, if the omission relates to a matter which is basic or fundamental, the failure to request additional charges does not constitute a waiver because the trial judge was already required to charge the jury on the correct principals of law. State v. Lyles, 41 S.E.2d 625 (1947); State v. McGee, 193 S.E. 303 (1937). This is particularly true when the charge goes to a defense raised by the defendant and the evidence. State v. Johnson, 44 S.E. 58 (1903); State v. Bostick, 131 S.E.2d 841 (1963)(failure to submit a question concerning an element of the offense is reversible error, especially where there is a conflict in the evidence or a dispute as to the facts supporting the element); State v. Day, 535 S.E.2d 431 (2000)(failure to tailor jury instructions to adequately reflect facts and theories presented by the defendant constitutes reversible error). Here, it was an element of the offense that the goods be stolen by someone other than the Applicant. Hamilton, supra; Tindall, supra; McNiel, supra; and State v. Wiles, 679 S.E.2d

172 FN 1 (2009).

V. APPLICANT WAS SENTENCED INAPPROPRIATELY WHEN HE WAS REQUIRED TO PAY RESTITUTION IN EXCESS OF THE PROVEN DAMAGES.

Prior to trial the victim Paul Thomas prepared an alleged work order which allegedly outlined the damages caused to the camper and sought restitution thereof. (See attached Exhibit). During the trial however, Mr. Thomas admitted that many items listed did not apply because the camper was new and the items had not yet been installed. Moreover, Mr. Thomas admitted that the photos taken by police at the time the camper was recovered, showed the stereo and amplifier contained therein and therefore Applicant should not be responsible for their replacement.

During sentencing however, the trial judge required Applicant to pay restitution in the amount of \$2,366.89, plus court costs, when in fact most of this alleged damages were not losses at all (because at the time the camper was stolen, it did not contain generators, batteries and full LP Gas tanks) and/or Applicant is not responsible for any missing or stolen stereo or amplifier equipment because they were in tact at the time police recovered the stolen camper and any loss thereof occurred after the camper was returned to Holiday Kamper.

VI. APPLICANT WAS DENIED DUE PROCESS, EQUAL PROTECTION OF THE LAW AND A FAIR OPPORTUNITY TO DEFEND AGAINST THE STATES ACCUSATIONS, WHEN HIS RECALCITRANT STAND-BY COUNSEL REFUSED TO ASSIST APPLICANT IN TRIAL PREPARATION, AND IN DEVELOPING HIS SUBSTANTIVE CASE.

Prior to trial the Applicant requested to represent himself

with the assistance of stand-by counsel. The Applicant maintained that he needed this assistance because he was incarcerated without access to legal research resources and needed stand-by counsel to assist him in developing his substantive case and to preserve his appeal rights during the trial.

In a pre-trial hearing conducted in February, 2009, judge Couch granted this request and Andrea Price was assigned to assist Applicant. (Tr. Trans. pgs. 83, ln. 3-pg. 85, ln. 9).

Ms. Price did not wish to assist the Applicant and went behind Applicant's back and sabotaged Applicants case by convincing another judge not to require her to help Applicant in pre-trial preparations. In another pre-trial hearing conducted on April 13, 2010, before Judge Cole, Ms. Price claimed that she felt that such assistance would constitute "hybrid representation" and convinced judge Cole that she would only have to set by Applicant during the trial to answer questions if needed. (Tr. Trans. pgs. 84, lns. 20-pg. 85, ln. 9). The Applicant filed written objections to this ruling contending that such assistance would come too late and be too little to be of any help to Applicant in preparing for trial.

On the day of trial, the Applicant reminded judge Couch of his previous ruling and moved to dismiss the charges on the basis that Applicant had been deprived of his right to stand-by counsel and that without her pre-trial assistance, he had been unable to prepare for trial or research all possible defenses. To proceed the Applicant maintained, would deprive him of a fair trial and fair opportunity to defend against the States accusations. (Tr. Trans. pgs. 82, ln. 15-pg. 87, ln. 7).

Judge Couch denied the motion and the trial proceeded.

Even during the trial Ms. Price acted as a recalcitrant stand-by counsel. She refused to give the Applicant proper advice or warnings concerning Applicants theories of defense. Many times the Applicant asked Ms. Price whether a legal position would be proper, explaining to her how the position would help his case and asking whether or not it would open the door for the State to harm the defense's case. Rather than telling Applicant what consequences could occur on any given position, she would repeat the same statement to every question. She would say, "I'm not your attorney. It is for you to decide whether or not your position would open the door or allow the State to harm your case".

There were many interruptions during the trial because Applicant's lack of evidentiary and procedural knowledge. Many were the result of Applicant asking inappropriate questions or questions that could have been asked if rephrased. The Applicant had written questions and knew what information he was attempting to elicit. The Applicant asked many times for Ms. Price to review his list of questions, cross out any inappropriate questions and help restructure any that could be rephrased to pass muster. Each time Ms. Price refused to help Applicant.

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On one occasion an inappropriate question was asked by Applicant that nearly caused a mistrial, (Tr. Trans. pgs. 289, lns. 16-pg. 293, ln. 9), and in another instance the Applicant asked an inappropriate question that required an answer based upon hearsay, and suggested that Applicant had dominion and control over the camper in question. (Tr. Trans. pg. 302, ln.

2-5). Had Ms. Price assisted the Applicant and went over his questions prior to trial, these mistakes could have been avoided.

In instances where the judge informed the Applicant that he could consult with his stand-by counsel, Ms. Price would smack her lips, make noises, cross her arms, act disgusted and speak degradingly to Applicant in front of the jury. On one occasion, while Applicant was questioning a witness, Ms. Price put her face in her hands and started shaking her head behind the Applicants back, but in front of the jury. (See attached Letter of Doug Tinsley). This must have given the jury the impression that even counsel at the defense table did not believe in Applicants innocence. Observers in the courtroom made comments that Ms. Price's "behavior was unprofessional and shocking to the point that it would have drawn attention in a bar".

At one point during the trial, the Applicant became so disgruntled from his mistakes and lack of trial research, that he suggested to Ms. Price that "maybe it would be best if you represented me for the rest of the trial". Ms. Price responded by saying that "I have not read your file nor prepared to represent you because you chose to represent yourself". Apparently, Ms. Price and judge Cole are of the opinion that stand-by counsel should be "seen-but-not-heard" and have no duty to vigorously assist the defendant or preserve the record for appeal. Anything else constitutes "hybrid representation" in their opinion.

Hybrid representation arises when a defendant represents himself pro se and is also represented by counsel. In hybrid representation the self-represented defendant and the attorney

act as co-counsel for the defense. State v. Cabrera-Pena, 567 S.E.2d 472 (2002). There are many problems associated with hybrid representation. For instance, counsel still "represents" the defendant and any errors can lead to ineffective assistance of counsel claims. Also, if counsel is too overzealous in their representation, the defendant could claim that counsel's behavior would have appeared to the jury that defendant was not representing himself and therefore he was denied his rights under Faretta.

As a result of the many problems associated with "hybrid representation", South Carolina has declared that there is no "right" to hybrid representation. Jones v. State, 558 S.E.2d 517 (2002). To solve the problems associated with hybrid representation, South Carolina has created what is referred to as Stand-by counsel. State v. Sanders, 237 S.E.2d 53 (1977). Stand-by counsel is a role assumed by an attorney who agrees to assist a pro se defendant with his defense and possibly represent him if the defendant loses or voluntarily relinquishes his pro se status. In stand-by counsel cases, the defendant specifically waives the ability to claim ineffective assistance of counsel against either himself or the attorney assisting him. Unlike hybrid representation, stand-by counsel does not "represent" the defendant. Faretta v. California, 422 U.S. 806, 834 n.46 (1975)(stating stand-by counsel may be available to represent the accused in the event the accused can no longer represent himself); McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8 (1984)(In stand-by counsel cases the defendant waives the right to claim ineffective assistance of counsel).

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Stand-by counsel is used by the courts for two main reasons: (1) to provide advice to the defendant, such as advice on procedural and evidentiary rules of the court and to assist the defendant in developing his substantive case; and (2) to ensure judicial efficiency by carrying on with the trial in the event the pro se defendant cannot continue in the defendant's representative capacity. McKaskle, supra, at 183.

There seems to be some confusion among attorneys and judges in South Carolina surrounding the role of stand-by counsel. Until recently, the doctrine of stand-by counsel has not been clearly defined. The Supreme Court of South Carolina confronted the doctrine for the first time in Sanders, supra. In the nearly four decades since Sanders, the courts has confronted the doctrine of stand-by counsel in relatively few cases. State v. Campen, 469 S.E.2d 619 (Ct. App. 1996); State v. Brewer, 492 S.E.2d 97 (1997); State v. Reed, 503 S.E.2d 747 (1998). Therefore, Reed is highly important to this area of law, for the court finally defined stand-by counsel as an "aid to the defendant to the extent he desires". Id. at 751.

This seems to solve the problem associated with hybrid representation because stand-by counsel can vigorously assist the defendant and if counsel becomes overzealous or goes beyond what the defendant "desires", he can simply request an in camera hearing and object to the extent of counsels assistance. If no objection is made, it may be presumed from the record, that the defendant consents to the extent of counsels vigorous assistance.

The Applicant believes that in most cases stand-by counsels

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role should be to assist the pro se defendant in substantive preparation by gathering the necessary materials needed to construct a capable defense. She should assist the defendant in conducting legal research into possible defenses. She should assist the pro se defendant procedurally by issuing subpoenas, filing motions, and addressing general procedural issues relevant to the pro se defendant's case. She should assist the defendant in reviewing his questions for witnesses in order to ensure they are appropriate and to help rephrase any questions that can be asked if in proper form. She should advise the defendant on all evidentiary matters. She should object to any questionable matters overlooked by the defendant in order to preserve the issue for appeal, and counsel should be prepared to represent the defendant in the event he chooses to waive his right to proceed pro se or in cases where the defendant's disruptive behavior constitutes a waiver of his right to proceed pro se.

Stand-by counsel should not address the court or jury except in the following circumstances: (1) she may object directly to evidentiary or procedural matters on behalf of the pro se defendant; (2) she may be required to cross-examine the victim so that the victim will not have to face the accused directly, and (3) she may be required to directly examine the pro se defendant. Finally, the jury should be informed of this arrangement prior to trial so they are not confused by the advisory counsels' role.

In the case sub-judice, Applicant's stand-by counsel refused to assist the Applicant in pre-trial preparation; refused to go over questions for witnesses or help rephrase questions so

they would be proper. She behaved unprofessional behind the Applicant's back, but in front of the jury and had the Applicant known at the time, he would have objected to this behavior.

In the few cases addressing this issue, the courts have held that due process and equal protection of the law require that incarcerated defendants seeking to represent themselves, must be provided with access to law books, witnesses and other materials necessary for preparing a defense. Milton v. Morris, 767 F.2d 1443, 1445-47 (9th Ci. 1985).

However, there is no absolute right to have access to a law library so long as the court provides an acceptable alternative method of conducting legal research. Love v. Summit County, 776 F.2d 908, 912-13 (10th Cir. 1985), cert. den. 479 U.S. 814 (1986). In most cases, the courts have held that stand-by counsel is one such acceptable method of conducting research into possible defenses because counsel can conduct research on the defendants behalf and report that information back to the defendant. United States v. West, 557 F.2d 151 (8th Ci. 1997).

In this case, the Applicant was not provided with access to legal research resources and his recalcitrant stand-by counsel was not an acceptable alternative method of conducting legal research into possible defenses because she refused to assist the Applicant at all. This lack of participation deprived Applicant of his right to stand-by counsel, Sanders, supra, (a pro se defendant has the "right" to stand-by counsel even if he is representing himself), and it denied Applicant due process

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of law, equal protection of the law and a fair opportunity to defend against the States accusations. Benitez v. Wolff, 907 F.2d 1293 (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).

VII. APPLICANT DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL.

As set forth in issue "VI" above, the Applicant sought to represent himself with the assistance of stand-by counsel. At the hearing on the matter, the judge may have asked Applicant if he understood the dangers of self-representation, but the colloquy amounted to nothing more than pro forma answers to pro forma questions. No judge ever informed Applicant that he could be forced to stand trial without the assistance of stand-by counsel or other legal research resources, if he chose to represent himself.

The Applicant was incarcerated prior to trial without access to a law library or other forms of research resources. While Applicant may have been potentially capable of constructing a substantive defense, he recognized he lacked the resources to do so and took definitive steps to negate this impediment.

The Applicant filed motions and objections complaining about judge Cole's restrictions on Counsels assistance that went beyond judge Couch's previous orders to provide stand-by counsel. Applicant complained and sought a dismissal of the charges on the day of the trial, because counsel had not assisted

the Applicant in any pre-trial preparations and refused to communicate with Applicant. South Carolina had repeatedly held that a defendant has the right to the assistance of counsel. even if he is representing himself. State v. Sanders, 237 S.E.2d 53 (1977); State v. Brewer, 492 S.E.2d 97 (1997).

In an attempt to overcome any mistakes, judge Couch instructed Ms. Price to "set-by" Applicant during the trial. However, this assistance was too late and was too little to be of any assistance to Applicant in conducting legal research into possible defenses. Applicant needed assistance prior to trial to prepare a substantive defense, not just during trial to answer questions. Milton v. Morris, 767 F.2d 1443, 1445-47 (1985)(a defendant is entitled to the assistance of counsel prior to trial to prepare for trial and during trial to answer questions).

The right to counsel is guaranteed by the Sixth Amendment of the U.S. Constitution. Gideon v. Wainwright, 372 U.S. 335, 339, 345 (1963). The right to counsel may be waived and a defendant allowed to proceed pro se, if the defendant clearly asserts his rights prior to trial. State v. Sims, 405 S.E.2d 377 (1991). The waiver of the right to counsel must be knowingly, intelligently and voluntarily made. State v. Brown, 347 S.E.2d 882 (1986). To validly waive the right to counsel, the defendant must be (1) advised of his right to counsel, and (2) adequately warned of the dangers of self-representation. Prince v. State, 392 S.E.2d 462, 463 (1990). The ultimate test however,, of whether a defendant made a knowing and intelligent

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waiver of the right to counsel, is not the trial judge's advice, but rather the defendant's understanding. Graves v. State, 422 S.E.2d 125 (1992).

In this case, while the record reflects that defendant knew he had a right to counsel - and even knew he had the right to stand-by counsel, even if he represented himself - the record does not establish that Applicant was adequately warned that he could be forced to stand trial without the assistance of "any" stand-by counsel or other means of conducting legal research. State v. Gardner, 570 S.E.2d 184, 187 (2002). The record clearly indicates that the Applicant chose to proceed pro se only if he were provided with stand-by counsel to assist him in preparing for trial. Applicant's subsequent motions, objections, and repeated requests for stand-by counsels assistance, should have placed the trial court on notice that Applicants waiver was not knowingly or intelligently given.

VIII. APPLICANT WAS DENIED A FAIR TRIAL AND HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL JUDGE PREVENTED THE APPLICANT FROM QUESTIONING A STATE WITNESS, BEN LINDLER, CONCERNING HIS DISHONEST CONDUCT WHERE THE TESTIMONY WOULD HAVE WENT TO THE WITNESSES CREDIBILITY.

During the trial Ben Lindler testified for the State. Mr. Lindler was the State's only witness which implicated the Applicant as having knowledge that the camper was stolen. The Applicant had already demonstrated that there was a heated debate between Mr. Lindler and the Applicant because Mr. Lindler had entered Applicant's home, without consent and taken thousands

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of dollars worth of Applicants property which Applicant later recovered from Mr. Lindler. (Tr. Trans. pgs. 231, ln. 17-pg. 251, ln. 10).

Mr. Lindler also worked at Advanced Auto in Woodruff and had taken money from his employers safe without consent and then gave a false statement to police that he had been robbed by a Mexican. (Tr. Trans. pgs. 278, ln. 21-pg. 286, ln. 17). When police discovered that Mr. Lindler had been dishonest, Mr. Lindler changed his story and claimed that Applicant was involved in that theft and others including the camper theft subject to this action. (Tr. Trans. pg. 280, lns. 1-12).

The State objected to any questions concerning the conviction of Mr. Lindler in relation to the Advanced Auto theft because Mr. Lindler had successfully completed a PTI program. The Applicant could care less about asking if Mr. Lindler had been "convicted" of involvement in that theft. What Applicant sought was the ability to go into the facts surrounding his "conduct in taking money without permission; giving a false statement to police that a Mexican had robbed him and that he gave this false statement to cover-up his own involvement - not because he was scared of the Applicant as he had previously indicated but because he was mad at Applicant for catching him stealing from Applicant's home and was looking for a way to lessen his own culpability. For it was only after being caught in a lie that he implicated the Applicant.

Over the Applicant's objections, the trial judge allowed the Applicant to question Mr. Lindler as to whether he had given

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Woodruff police a false statement, but would not allow the Applicant to go into the fact that Mr. Lindler had taken money, or that he gave a false statement to cover-up his own involvement, or that it was only after being caught in the lie that he implicated the Applicant.

The Applicant admits that because Mr. Lindler had completed PTI, it is as if no conviction had occurred and the defense may not question Mr. Lindler concerning his "arrest" or "conviction". State v. Joseph, 491 S.E.2d 275, 278 (1997). In Joseph however, the court realized that protecting both the "arrest" or "conviction" and the "conduct" from inquiry would be unfair if it prevented a party from using information that could affect the witness's credibility. Id. The court suggested that "allowing impeachment through a carefully worded question about the underlying conduct, but not the arrest, would ensure that all litigants are able to present all relevant information to the jury". Id.

The Applicant maintains that under Rule 608(b) he should have been allowed to question Mr. Lindler in more detail about his "conduct" surrounding the false statement and the courts refusal constituted a denial of Applicants right to confront witnesses against him.

In connection, the taking of money from the safe constitutes theft and stealing is a crime of dishonesty. State v. Shaw, 492 S.E.2d 402, 404 (1997). Even under rule 609(a)(2), crimes involving dishonesty are admissible regardless of the danger

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of unfair prejudice and the trial judge may not have had discretion to exclude this testimony under the unique facts of this case.

Finally, under Rule 404(b), Mr. Lindler's conduct in committing these other crimes, wrongs or acts should have been allowed to show motive, bias, the existence of a common scheme or plan, intent, and the lack of reliability. State v. Jenkins, 474 S.E.2d 812 (1996)(it is a violation of the confrontation clause to prohibit defense from cross-examining witnesses to show bias or otherwise expose to jury facts which jurors could draw inferences relating to reliability of witness).

The questionable conduct would have demonstrated that Mr. Lindler had a common scheme or plan to take money from his employer and blame it on an innocent Mexican. It would also have demonstrated that once he was caught by police in the false statement, he formulated a motive and intent to implicate the Applicant to lessen his own culpability. Coupled with the fact that detectives admitted that Mr. Lindler told them that he was looking for a way to get the Applicant back for catching him stealing property from Applicant's home, goes toward demonstrating that Mr. Lindler had a motive, intent, bias toward the Applicant and that his truthfulness and reliability as a witness should be questioned by the jury.

IX. APPLICANT WAS DENIED A FAST AND SPEEDY TRIAL.

The challenged crime occurred in October, 2006. Applicant was arrested on June 18, 2007 and filed for a fast and speedy

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trial. The State continuously delayed the Applicant's trial in order to gain an unfair tactical advantage. At the time of trial, nearly four (4) years had passed since the crime occurred. The Applicant continuously objected to delays and continuances, in open court and in writing.

Because of the delay, the witnesses who testified, repeatedly maintained that they could not remember exactly what was said or occurred and this made it impossible for the Applicant to establish what really happened four (4) years earlier. (Tr. Trans. pgs. 21, lns. 22-pg. 22, ln. 3; pg. 258, ln. 4-8; pg. 259, lns. 17-19; pg. 262, lns. 6-8; pg. 300, lns. 12-17; pg. 302, lns. 11-12 and pg. 330, lns. 7-14). Defending against such a stale prosecution made the charges indefensible. Including being able to locate Bill Dotson and having him testify or confront him about selling the stolen camper to Applicant and what information was given to Applicant concerning its stolen character. (Tr. Trans. pgs. 316, lns. 4-pg. 317, ln. 21).

It came to light during the trial that the reason for the delay was so that the State's star witness, Ben Lindler, could complete PTI and testify for the State without having his credibility attacked when he testified. (Tr. Trans. pg. 279, lns. 16-23).

"There are four factors to be used in determining whether a defendant has been denied the right to a speedy trial, including: (1) the length of delay; (2) the reason the government uses to explain the delay; (3) when and how the defendant assert-

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ed his speedy trial rights; and (4) the prejudice to the defendant". State v. Kennedy, 528 S.E.2d 700, 704 (2000)(Quoting Barker v. Wingo, 407 U.S. 514 (1972)).

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Id. at 530. In Doggett v. United States, 505 U.S. 647, 652 n. 1 (1992), the Supreme Court suggested in dicta, that a delay over one year is presumptively prejudicial.

In the case sub-judice, the Applicant filed a timely motion for a fast and speedy trial and complained at every opportunity to further delays and the State cannot provide a justifiable reason for the delay. No legitimate reason for a nearly four (4) year delay in prosecuting the case exists. Congestion is not a good cause where no attempt was made to transfer the case to another judge or to increase the criminal trial callendar. United States v. Ford, 550 F.2d 732, 743 (2d Cir. 1977), Aff'd sub nom. United States v. Mauro, 436 U.S. 340 (1978); State ex rel Hammett v. McKenzie, 596 S.W.2d 53, 58 (Mo. Ct. App. 1980)(crowded docket held not good cause where civil cases should have been continued so that criminal trial is timely).

In light of the fact that there is no legitimate reason for the delay, it stands to reason that the State continuously delayed the trial so that its star witness could complete the PTI program and escape having to admit his arrest and conviction on cross-examination. The delay for this reason was the State's attempt at gaining an unfair tactical advantage, because it prevented the Applicant from attacking Mr. Lindler's character

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which involved dishonesty in taking property belonging to others and in giving false statements to police to cover his involvement, and it resulted in Applicant being unable to call Bill Dotson as a witness because the State knew Applicant had claimed to have purchased the stolen camper from Mr. Dotson. (Tr. Trans. pg. 90, lns 8-14).

X. APPLICANT WAS DENIED A FAIR TRIAL WHEN THE COURT REFUSED TO EXCLUDE A CONVERSATION WITH DETECTIVE BECK WHERE THE STATEMENT WAS GIVEN UNDER DURESS, COERCION AND THREAT OF EXTENDED DETAINMENT AND WHERE THE CONVERSATION WAS NOT RELATED TO THE OFFENSE IN QUESTION.

Following Applicant's arrest, he was interviewed by Detective Beck. The Applicant contended that Beck patted his gun and acted in an unstable and aggressive manner and indicated that he would hold Applicant in an interview room for hours if Applicant did not cooperate.

The Applicant contended that he did not want to speak with the detective but felt that he would be held for many hours and unable to make bond until he was taken to the jail and seen by a magistrate. The Applicant contended that he decided to speak to the detective but wrote above his signature "Without Prejudice, U.C.C. 1-207". The Applicant contended that he did this because he believed that a judge in the future would recognize this as Applicant's attempt to demonstrate that at the time of the interview, Applicant in fact was not speaking voluntarily. This would also demonstrate that Applicant was not after the fact trying to manufacture a claim of an involuntary statement. (Tr. Trans. pgs. 108, lns. 24-pg. 109, ln. 7; pg. 114, ln. 14-23; pg. 111, lns. 11-18).

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The trial judge denied the suppression of the statement claiming that the Uniform Commercial Code does not apply to that court's proceedings. The Applicant believes the judge missed the point, for even if the U.C.C. did not apply to that court, the Applicant's behavior in writing this form of notice that a document was signed under duress and coercion should have been taken to demonstrate the state of Applicant's mind and what he was thinking at the time the statement was given and to demonstrate the truthfulness and reliability of Applicant's testimony concerning those events.

Moreover, the Applicant believes that the U.C.C. does in fact apply to all courts by way of the Bankruptcy of 1933 and the Supreme Courts decision in 1938 requiring all courts to operate under a "condition of contract".

Most importantly however, at the time of the interrogation, Applicant was not under arrest for the stolen camper subject to this attack. Applicant had been arrested on another unrelated offense involving the Advanced Auto crime for which Mr. Lindler later plead guilty and went through PTI.

It should be noted that the statement was not inculpatory and dealt with questions surrounding someone taking money from the Advanced Auto and several stolen campers seen at Bill Dotson's Shop in Spartanburg. (Tr. Trans. pgs. 110, lns. 9-19; pg. 111, lns. 21-23; pgs. 107, lns. 19-pg. 108, ln. 18).

The Applicant admitted that he had seen some campers at Dotson's Shop before but did not admit to stealing them, possessing them or having any knowledge of where they came from. Appli-

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cant was not questioned at "that" time about the stolen camper subject to this attack because it was not even discovered or known about for nearly two more weeks. For this reason, Applicant contends that all testimony of Beck should have been suppressed because it was not admissible if it were not related to the offense in question. State v. Jenkins, 452 S.E.2d 612 (1994)(See: Tr. Trans. pg. 96, lns. 1-3).

The State used the introduction of this interrogation to suggest that when Applicant first talked to Detective Beck and was asked about the camper at Bill Dotson's shop, that Applicant must have known the camper he had at his Grandmothers home was stolen because he did not mention it to police at the time. It must be noted however, that there was no evidence that "this" camper was at Dotson's shop at the time the "other" campers were seen there. This mislead the jury and may have resulted in a guilty verdict on an improper basis.

Even the jury came back wanting to know "when" I first talked to Beck. They too, apparently felt Applicant's silence concerning the instant trial, was indicative of Applicant's guilty knowledge. The problem was Applicant was under arrest at the time and had the right to remain silent. Applicant did not have to tell Beck about "this" camper and the fact that Applicant did not, should not have been used to suggest his guilt. That would be the same as arguing that if a defendant does not testify in his own defense, his silence should suggest his guilt. Carter v. Garrison, 656 F.2d 68 (4th Cir. 1981); McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)(Miranda warnings

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are case specific and only apply to the crime for which the defendant is "in custody"); Stansbury v. California, 511 U.S. 318, 321 (1994)(a defendant has the right to remain silent and is under no obligation to speak with police once in custody or under arrest); Griffin v. California, 380 U.S. 609, 611, 615 (1965)(State may not comment on inference of guilt by defendants decision not to testify).

In addition to the conversation being unrelated to the offense in question, Applicant believed that the statements should have been suppressed as being involuntarily given. The trial judge did not suppress the statements because he believed they were not made pursuant to any "threats" or "promises" but failed to recognize that the statements should be suppressed if the were obtained by the "exertion of an improper influence". State v. Register, 476 S.E.2d 153 (1996); State v. Saltz, 551 S.E.2d 240 (2001); State v. Corns, 426 S.E.2d 324 (1992); Davis v. North Carolina, 384 U.S. 737, 752 (1966)(confession involuntary where police held suspect over extended period); McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States, 354 U.S. 449 (1957)(reaffirming rule which precludes admission of statements where unnecessary delay in presenting arrestee to magistrate for arraignment).

XI. APPLICANT WAS DENIED A FAIR TRIAL WHERE THE JUDGE REFUSED TO CHARGE THE JURY THAT WHEN DEALING WITH CIRCUMSTANTIAL EVIDENCE THAT POINTS EQUALLY TO GUILT AND INNOCENCE, SUCH EVIDENCE MUST POINT CONCLUSIVELY TO THE GUILT OF THE ACCUSED TO THE EXCLUSION OF EVERY OTHER REASONABLE HYPOTHESIS.

At the close of the Defenses case, the Applicant requested that the jury be charged with the law concerning circumstantial

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evidence. Particularly, that they be given some acceptable charge that includes the phrase "to the exclusion of every other reasonable hypothesis". (Tr. Trans. pgs. 63, lns. 17-pg. 64, ln. 9; pg. 79, ln. 20-pg. 80, ln. 1).

The trial judge declined to give such a charge, apparently relying upon the theory that the "law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence". State v. Grippon, 489 S.E.2d 462 (1997). Applicant believed the trial judge missed the point and believes that under the unique facts of this case, where the evidence pointed equally to guilt and to innocence, the jury should have been made aware that it would be all but impossible to find guilt beyond a reasonable doubt.

In the case sub-judice, the evidence pointed equally to guilt and innocence of the indicted offense. (Tr. Trans. pg. 331, lns. 15-17). The evidence suggested that Applicant could have been a "reciver" of the stolen camper, thereby making him guilty, but the evidence likewise indicated that Applicant may have "stolen" the camper himself, in which case he would have been innocent of the indicted offense. State v. Hamilton, 174 S.E. 396, 397 (1934)(where a larceny has been committed, the principal thief, that is the one who is guilty of the actual caption and asportation, cannot be adjudged guilty of criminally receiving the thing stolen for the reason that he cannot receive from himself); State v. Tindall, 50 S.E.2d 188, 190 (1948); State v. McNiell, 445 S.E.2d 461, 462 (1994); State v. Wiles, 679 S.E.2d 172 FNi (2009).

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Because the Court in Ulster County Court v. Allen, 442 U.S. 140 (1979) held that if the evidence points equally to a defendants guilt and equally to his innocence on the indicted offense, then a reasonable jury must necessarily entertain a reasonable doubt. See: Cosby v. Jones, 682 F.2d 1373, 1383 (1982); State v. Cherry, 559 S.E.2d 297 FN 11 (2001)(if evidence is equally consistent with guilt and innocence, it is incapable of providing a reasonable and logical basis for determining guilt); Jackson v. Virginia, 443 U.S. 307 (1970)(when the choice between guilt and innocence reaches a certain degree of conjecture and speculation, then the defendant must be acquitted).

In the case sub-judice, the purpose of the charge sought by the Applicant was not to suggest that a distinction exists between "the weight or value to be given to direct and circumstantial evidence", but rather to inform the jury that if a reasonable hypothesis exists for how the crime occurred, they should not convict Applicant because it would require them to speculate as to the Applicants guilt, and such speculation is insufficient to convict. State v. Ballenger, 470 S.E.2d 851, 853 (1996)(evidence which raises a mere suspicion of guilt could only require the jury to speculate as to the guilt of the accused, is insufficient). Such speculation suggests that the State had not proven its case beyond a reasonable doubt or the evidence at least was not sufficient that "guilt logically can be inferred". Jackson, supra, at 316-17.

The inferential nature of the circumstances presented in this case justified additional instructions to guide the jury

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in making appropriate logical inferences and thus deny a finding of guilt based upon mere probability. In this case Applicants guilt could not have been "logically inferred" because the evidence pointed equally to Applicant being the thief who stole the camper and if so, he could not have been convicted of "receiving" the same camper. Obviously, there was a reasonable alternative hypothesis for how the crime occurred that was consistent with Applicants innocence on the indicted offense.

The fact that Grippon emphasizes that direct and circumstantial evidence are to be given the same weight, does not mean that direct and circumstantial evidence are to be evaluated in the very same manner. The requested charge clarifies the jury's responsibility to evaluate circumstantial evidence carefully and gives jurors more detailed information about the relation of circumstantial evidence to the determination of guilt. Most importantly, it helps to distinguish the difference between conjecture, speculation, and proof beyond a reasonable doubt. It informs the jury that if there is some other reasonable explanation or hypothesis for how the crime occurred, then the State may not have proven its case beyond a reasonable doubt.

This distinction is of utmost importance in this case because although it is inferable that Applicant received the stolen camper from someone else who stole it, it is equally as inferable, that Applicant stole it himself and is actually innocent of the indicted offense.

In sum, there is no direct evidence that Applicant received the camper from someone else who stole it. No one testified

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they were present when the camper was stolen or when it was received, if in fact it was received from another. Therefore, even if each circumstance were proven beyond a reasonable doubt, jurors must still ask themselves, under the Edwards charge, whether there is any other reasonable conclusion other than guilt.

In this case there was because the States witnesses testified that Applicant may not have received the camper from someone else who stole it, but rather, could have stolen it himself. Without this instruction, the jury does not know that this critical step in the reasoning process exists. In fact, the jury is without an analytical framework in which to evaluate the evidence. That the evidence and circumstances could lead a juror to make reasonable inferences either way, highlights the importance of giving additional charges.

Applicant does not mean to suggest that the Grippon case is wrong, only that in unusual cases such as this one, where the evidence points equally to guilt and innocence, that the jury should be given additional charges which might prevent them from finding guilt on an improper basis. For instance, the jury may not have known that there was a distinction between receiving and larceny and may have believed that Applicant could be found guilty of receiving stolen goods even if he were the thief who stole them himself.

XII. APPLICANT WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WERE COUNSEL FAILED TO RAISE ALL MERITORIOUS ISSUES THAT COULD HAVE BEEN RAISED ON APPEAL.

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The Applicant represented himself at trial and wanted to represent himself on appeal. Applicant attempted to raise some of the issues contained herein for appellate review. The Court of Appeals ruled that Applicant had no right to self representation on appeal and returned Applicants "Pro se Brief on Appeal" without filing it. State v. Roberts, 614 S.E.2d 626 (2005).

Applicant was appointed Dayne C. Phillips and sent him several letters requesting that he brief the issues Applicant had prepared. On direct appeal, counsel only raised one issue that the search and seizure of the camper was unlawfully conducted in violation of the Fourth Amendment.

The right to effective assistance of counsel includes the right to assistance of appellate counsel. Anderson v. State, 581 S.E.2d 834 (2003). Although counsel need not press on appeal particular issues of the defendants choosing, counsel must consult with the defendant to identify whether there are any meritorious issues to appeal. Frazer v. South Carolina, 430 F.3d 696 (4th Cir. SC 2005). Moreover, counsel cannot be found ineffective for failing to raise issues as to which there is no reasonable likelihood of success, Jones v. Catoe, 9 Fed. Appx. 245 (2001), or if counsel articulates a valid reason for employing a certain strategy. Gilchrist v. State, 565 S.E.2d 281 (2002).

However, counsel can be found ineffective if they fail to raise an issue that has a likelihood of success and cannot articulate a valid reason for failing to do so. Patrick v. State, 562 S.E.2d 609 (2002); Southland v. State, 524 S.E.2d 833 FN4 (1999); Ezell v. State, 548 S.E.2d 852 (2001); Frazer v. State,

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430 F.3d 696 (2005)(imposition of consecutive rather than concurrent sentences is a non-frivolous issue for appeal and constitutes prejudice).

In the case sub-judice, appellate counsel should have known that "receiving stolen goods" ends the moment the goods are received and therefore the State must prove that the goods were received on the date alleged in the indictment; otherwise the defendant would be denied his right to have a grand jury indictment on the transaction and event he is being tried upon. Appellate counsel should have known that a conviction may not be had by stacking inferences upon inferences and that the receipt or possession of the stolen camper must occur in Spartanburg County in order to have venue. Appellate counsel should have known that a jury cannot logically conclude guilt beyond a reasonable doubt when the evidence points equally to guilt and innocence of the indicted offense. Appellate counsel should have known that because the disputed evidence suggested that Applicant was a thief and a receiver, the court had a duty to instruct the jury that if they find that Applicant were the thief, they must find him not guilty. Appellate counsel should have known that it was error to refuse to exclude testimony and statements that were unrelated to the current charges and that they were not given freely and voluntarily, where they were obtained by the "exertion of an improper influence".

In other words, appellate counsels performance constituted ineffective assistance of counsel because had counsel raised these issues, Applicant would have been entitled to a

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reversal of the conviction and counsel cannot articulate a valid reason for failing to do so. Strickland v. Washington, 466 U.S. 668 (1984).

Finally, because Applicant was deprived of effective assistance of appellate counsel, this court is authorized to grant relief in this PCR action for counsels failure to raise those issues on direct appeal. Bozeman v. State, 414 S.E.2d 144 (1992) (hearing direct appeal issue because of counsels ineffectiveness); Drayton v. Evatt, 430 S.E.2d 517, 520 (1993); Murray v. Carrier, 477 U.S. 478, 488 (1986).

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- iv. _____
- (d) the date of each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) N/A
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? No
- (b) your trial, if any? No
- (c) your sentencing? No
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Dayne C. Phillips, Appellate Defender, P.O. Box
11589, Columbia, S.C. 29211
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Appeal
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
Conviction be reversed and Applicant be granted a new trial
20. Are you now under sentence from any other court that you have not challenged?
Yes

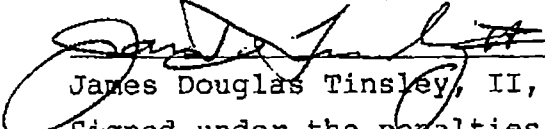
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STATE OF SOUTH CAROLINA

County of SPARTANBURG

VERIFICATION

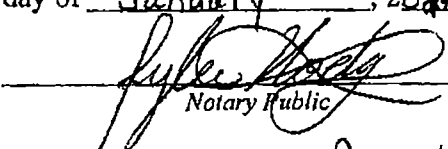
I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.


James Douglas Tinsley, II, #171943

Signed under the penalties of perjury

SWORN to and subscribed before me this 17th
day of January, 2014.

(L.S.)


Notary Public

My Commission Expires: August 2nd, 2021

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2014 JAN 30 AM 3:09

CAMPING WORLD RV SALES - GR
 114 BEST DRIVE
 SPARTANBURG SC
 US
 29303
 864-699-5400

WORK ORDER # 26677

Completed: 09 APR 07 Customer: [REDACTED] - GEIGER, DAVID T
 Invoice #: Address: [REDACTED]
 Author: PRT MATTHEWS, N.C.
 Stock No: 116964 28105
 Year/Make: GR 2007 NITROUS 260FSX Home Phone: [REDACTED]
 Model: 260FSX Work Phone: [REDACTED]
 Serial No: 4CP7F262572900569 Purchase Date: 25 MAY 07
 Chassis No: 4CP7F262572900569 Date In: 08 MAR 07
 Mileage: Promise Date:
 Key No: Schedule Date:
 Location: IH License No:
 Regn No: 00300 Trim:
 Warr. Date: 25 MAY 07 Promise Time:

Job #	Description	JOB INFORMATION	Type	Bill to
1	REMOVE DECALS (UNIT WAS STOLEN AND HAS HAD DIFFRENT DECALS ON IT)		I INT	CHARGE TO UNIT
2	PDI TT P120-5.00		I INT	CHARGE TO UNIT
3	FILL LP		I INT	CHARGE TO UNIT
4	NEED LP ACCESS DOOR		I INT	CHARGE TO UNIT
5	WINTERIZE		I INT	CHARGE TO UNIT
6	ORDER RADIO & AMPLIFIER		I INT	CHARGE TO UNIT
7	REWIRE AMPLIFIER (WIREING ALL JERKED OUT)		I INT	CHARGE TO UNIT

Job #	Part No	Description	PARTS	Bill to	Qty	Price	Total
2	9V	9 VOLT BATTERY		I-INT	1	2.75	2.75
2	FB108	PAINT-BUMPER		I-INT	1	17.95	17.95
4	458822	LP ACCESS DOOR		I-INT	1	98.45	98.45
6	487938	STEREO-AM/FM/CD		I-INT	1	380.45	380.45
6	478333	AMP-800W/MULTI		I-INT	1	385.45	385.45
1	24M	BATTERY RV		I-INT	2	71.45	142.90

Job #	Lab Code	Description	LABOUR	Mec bill to	Hrs	Rate	Total
1	DECAL	REMOVE DECALS	BLF I-INT		1.50	99.00	148.50
2	P120	PDI TRAVEL TRAILER	BLF I-INT		5.00	99.00	495.00
3	LPFILL	FILL LP TANKS	BLF I-INT		0.50	99.00	49.50
2	P120	PDI TRAVEL TRAILER	BLF I-INT		0.00	99.00	0.00
5	W490	WINTERIZE RV (DRAIN &	BLF I-INT		1.50	99.00	148.50
2	P120	PDI TRAVEL TRAILER	BLF I-INT		0.00	99.00	0.00
4	C318	REPLACE COMPARTMENT DO	BLF I-INT		1.00	99.00	99.00
6	5446	INSTALL RADIO NEW	BLF I-INT		0.60	99.00	59.40

Continued on page 2

Work Order : 26677

```
*****
Job #  Lab Code  Description  LABOUR  Mec bill to  Hrs  Rate  Total
*****
   7  E390      WIRE (110 VAC, PER LIN BLF I-INT  2.00  99.00  198.00
*****
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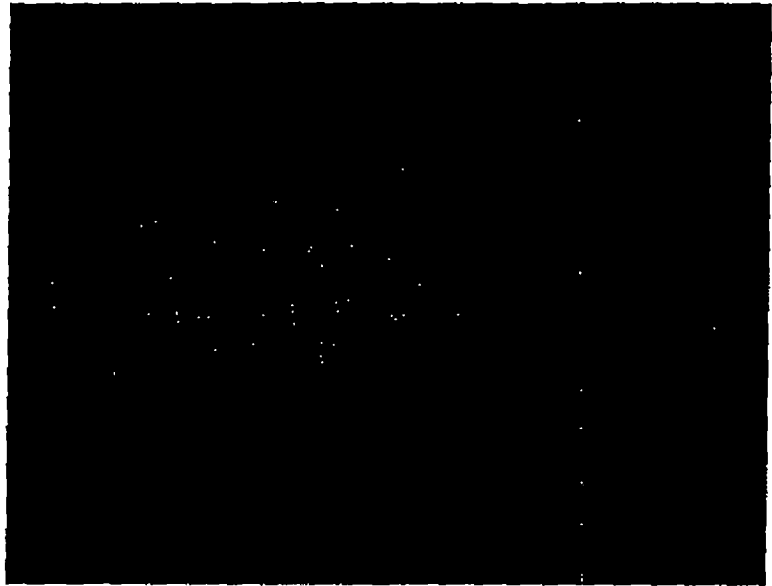
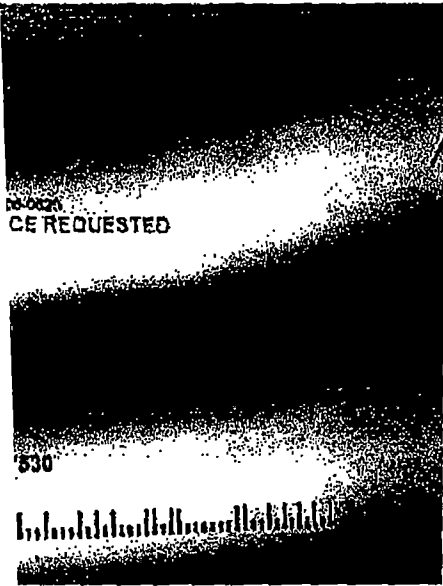
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*****
Job #  Sublet Description  SUBLET  bill to  Vendor  Total
*****
   3  LP GAS              I-INT  00300-CAMPING  33.04 -
*****
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*****
Job #  Excode  Description  EXTRAS  bill to  Qty  Price  Total
*****
   1  FRT      FREIGHT      I-INT  1.00  20.00  20.00
   1  SS      SHOP SUPPLIES  I-INT  1.00  30.00  30.00
   4  FRT      FREIGHT      I-INT  1.00  20.00  20.00
   6  FRT      FREIGHT      I-INT  1.00  38.00  38.00
*****
```

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*****
                                BILLINGS SUMMARY
Type Bill Id  Parts  Labour  Sublet  Extras  Tax  Total
*****
I  INT        1027.95  1197.90  33.04  108.00  0.00  2,366.89
      totals  1027.95  1197.90  33.04  108.00  0.00  2,366.89
*****
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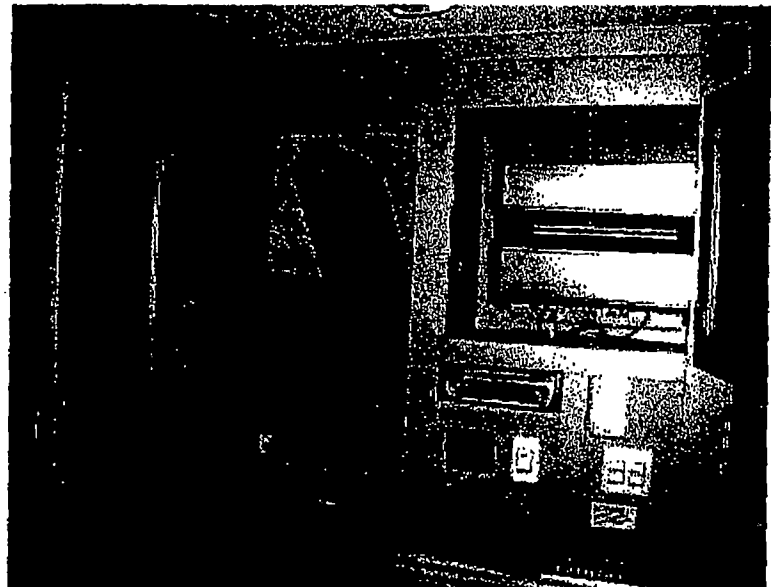
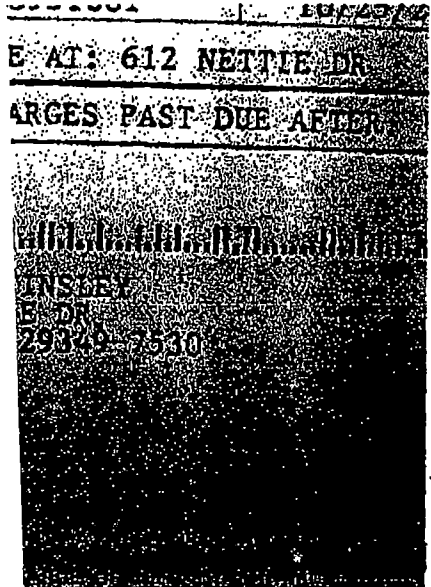
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EXHIBIT "A(3)"

November 15, 2010

Re: State vs. James D. Tinsley-Case # 2007-GS-4205031

After careful consideration I have decided to document, for the court, my personal observations during the trial of James D. Tinsley II held on November 10-12-2010 before the Honorable Roger Couch. These observations center around the behavior of Ms. Andrea Price, stand-by counsel for the defense.

Since my son James, the defendant, was incarcerated during the nearly 2 years prior to trial, it fell to me to act as his go-between with Ms. Price regarding pre-trial matters. For the most part my efforts to establish two-way communication between the defendant and his stand-by counsel was a failure. To the best of my knowledge none of James' letters requesting help or guidance were ever answered by Ms. Price. Based upon my conversations with the defendant at that time, I believe that it was this failure to communicate by Ms. Price that was the main reason the defendant chose to represent himself. It had not been his first choice as I had been the one who had taken him to the public defenders office early on when he paid the \$40 fee and made his request for counsel.

In addition, James' requests to have Ms. Price visit him at the Spartanburg County Detention Center for consultation on several occasions in the months prior to trial apparently went unanswered.

After James' appearance in front of the Honorable Durham Cole in April 2010, I learned that Ms. Price had asked to be relieved of her pre-trial duties in representing James and that Judge Cole had granted her request, thereby placing all pre-trial responsibilities on the defendant.

With all of this in mind I was forced to conclude that Ms. Price did not want to be involved in James' case as stand-by counsel. I was not, however, prepared for the behavior which Ms. Price exhibited towards James during his trial.

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SPARTANBURG COUNTY
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Prior to James' case being called I was sitting on a bench outside the courtroom with two other witnesses when Ms. Price came by. I spoke to her and asked if she would give two documents to Mr. Kendall because he had requested them previously. Ms. Price took the two documents saying she would give them to Mr. Kendall. As she walked away one of the other witnesses asked me, "What is she so mad about?" Unfortunately, that angry demeanor seemed to prevail throughout the trial.

On day 3 of the trial myself, Hogan Justice, Cindy Reed, Ms. Price and the defendant were taken to a small room so the defendant could speak with his witnesses and confer with Ms. Price. The defendant had a sheet of paper with some questions on it that he wished to ask Ms. Price. When the defendant tried to ask Ms. Price one of these questions she simply answered, "I am not your attorney and I can't tell you what to say."

What concerned me most, however, was a Ms. Prices' actions in front of the jury. Being seated behind the defense table I had a clear view of the interactions between the defendant and Ms. Price. The behavior witnessed by myself on the part of Ms. Price consisted of the following:

1. Angry facial expressions while the defendant was attempting to consult with her.
2. Repeated gesturing and waving of arms which seemed to express contempt for the defendant.
3. Pushing of paperwork across the defense table at the defendant accompanied by angry facial expressions and hand gestures which, to me, indicated disgust.
4. Sitting with her head down and arms across her chest while witnesses were testifying.
5. Placing her face in her hands and shaking her head side to side when the defendant asked a question of a witness that she apparently disapproved of.

It is not my intention to judge Ms. Price, I have no right to do so. However, I am at a loss to understand or explain the behavior I witnessed by a professional in a courtroom setting and in front of a jury who held the fate of her client in their hands. This behavior did not go unnoticed by the jury as on several occasions I observed the jury watching Ms. Prices' actions.

I am unable to say what the jurors thought and how such behavior towards one's own client might have prejudiced the jury. In conclusion and in an attempt to summarize what I witnessed on those 3 days of trial I can only re-state what I said immediately thereafter and that is, "the behavior which I witnessed Ms. Price exhibit towards her client would not have gone un-noticed in a bar much less in a court of law."

Rest assured, I have no animosity towards Ms. Price and have no desire to harm her career, nor lessen her standing among her peers. For this reason I have chosen to submit this letter to the Court rather than the Office of Disciplinary Counsel.

Respectfully submitted,

James D. Linsley Jr.

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SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2014-CP-42-0384
James Tinsley, #171943,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed February 7, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the October 2007 term of the Spartanburg County Grand Jury for receiving stolen goods (2007-GS-42-5031). The Applicant proceeded *pro se*, with Andrea D. Price, Esquire, as stand-by counsel. On November 10, 2010, the Applicant proceeded to trial where he was found guilty of the charge by a jury. The Honorable Roger L. Couch sentenced Applicant to ten years, suspended upon the service of three years to five years of probation. The sentence was ordered to run consecutively to the sentences received by Applicant on July 31, 2008, following convictions in Oconee County.

A timely notice of appeal was filed by Applicant on his own behalf. However, the Applicant was represented by the Office of Appellate Defense on his appeal and Dayne C. Phillips, Esquire, filed a brief on Applicant's behalf. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Tinsley, Op. No. 2012-UP-639 (filed December 5, 2012). Applicant filed a

Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on January 8, 2014. The Remittitur was returned on February 25, 2014.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. Trial court error, in that;
 - a. "Applicant was denied a fair trial when the trial judge failed to direct the verdict where the evidence did not establish that the 'stolen goods' were received or possessed on or about the exact date of the indictment,"
 - b. "Applicant was denied a fair trial when the trial judge refused to direct the verdict where the evidence required the jury to stack inferences upon inference and the court lacked venue,"
 - c. "Applicant was denied due process of law and a fair trial when the trial judge failed to charge the jury on the law and to inform them that they must find Applicant not guilty if they determine that he stole the camper himself,"
 - d. "Applicant was sentenced inappropriately when he was required to pay restitution in excess of the proven damages,"
 - e. "Applicant did not knowingly and intelligently waive his right to counsel,"
 - f. "Applicant was denied a fair trial and his right to confront witnesses against him when the trial judge prevented the Applicant from questioning a State witness, Ben Lindler, concerning his dishonest conduct where the testimony would have gone to the witnesses credibility,"

- g. "Applicant was denied a fair trial when the court refused to exclude a conversation with Detective Beck where the statement was given under duress, coercion and threat of extended detainment and where the conversation was not related to the offense in question,"
 - h. "Applicant was denied a fair trial where the judge refused to charge the jury that when dealing with circumstantial evidence that points equally to guilt and innocence, such evidence must point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis,"
2. Denial of due process, in that;
- a. "Applicant was denied his due process rights when he was convicted based upon evidence that pointed equally to guilt and innocence on the indicted offense,"
 - b. "Applicant was denied due process, equal protection of the law and a fair opportunity to defend against the State's accusations, when his recalcitrant stand-by counsel refused to assist Applicant in trial preparation, and in developing his substantive case,"
 - c. "Applicant was denied a fast and speedy trial,"
3. Ineffective assistance of appellate counsel, in that;
- a. "Applicant was denied effective assistance of appellate counsel were (sic) counsel failed to raise all meritorious issues that could have been raised on appeal."

III.

Respondent submits that allegations 1(a)-1(h), 2(a)-2(c) all raise direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss these allegations.

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A 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. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel 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). 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. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

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.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of

fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claim ineffective assistance of appellate counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

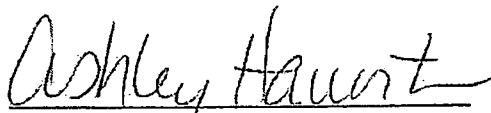
September 8, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
JAMES TINSLEY, #171943	)	2014-CP-42-0384
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
PO Box 1015
Rock Hill, SC 29730

DATED this 8TH day of September, 2014.


 Ashley Haworth, Legal Assistant
 For Respondent

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>
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No exhibits were marked during proceeding.

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 5:25 p.m.)

THE COURT: All right. Y'all ready to go on this one, or you need a minute?

MS. MOODY: We're ready to go, Your Honor. He has a motion.

THE COURT: Okay.

MS. MOODY: But I was fired, and I think that's the issue we informed the Court earlier.

THE COURT: Right. All right. I'll be glad to hear his motion.

(Whereupon, Ms. Moody and the applicant conferred.)

MS. OLIVE: Your Honor, by -- by way of background, Mr. Tinsley has been on the docket the last two PCR terms. In September he made a motion to -- well, he had a pending motion to relieve counsel. He withdrew the motion at that time. And that was before Judge Barber.

This most recent term in November, he again had a motion to relieve counsel. Judge Hyman denied his motion to relieve counsel at this time, I believe giving him an opportunity to raise it again, which I understand he wishes to do at this time.

MS. MOODY: No.

THE COURT: Okay.

MS. MOODY: Actually, it wasn't a motion. I just

1 received a letter January 5th, 2015 -- 2016, that I was
2 fired. Also, we received a motion for summary judgment
3 motion, which, as I understood that motion, he wanted the
4 Court to hear on the record -- or -- or review the record
5 to determine whether or not his relief could be granted.

6 And I'll turn it over to him for him to further go on
7 with that argument. But he did file it. He served the
8 state on it, as to whether or not his appellate counsel was
9 ineffective assistance of counsel.

10 In this particular case Mr. Tinsley represented
11 himself in the trial. I beg the Court's indulgence.

12 THE COURT: Okay.

13 (Off the record briefly.)

14 MS. MOODY: At the trial of this case, he represented
15 himself. And so he recognizes that he can't file
16 ineffective assistance of counsel against himself. His
17 application is against his appellate counsel.

18 The document that he served on the state, which was
19 his motion for summary judgment motion, he is asking in
20 that motion that the Court hear the motion and direct a
21 verdict in his matter. Because the only thing that the
22 Court would have would be the court -- the appellate
23 court's -- excuse me -- the appellate counsel's brief that
24 he filed on his behalf after his trial.

25 THE COURT: Well, did he file a PCR against his

1 appellate counsel?

2 MS. MOODY: He did.

3 MS. OLIVE: Your Honor, just for clarity of the
4 record, the state -- I just want to clarify whether he is
5 going to proceed pro se at this time or if he is still
6 represented.

7 THE COURT: I'm fixing to get it.

8 MS. OLIVE: Okay. And I can get into all of his
9 procedural history and sort of clarify that for Your Honor,
10 if -- if he wants to handle his ---

11 THE COURT: Okay.

12 MS. OLIVE: --- motion first.

13 THE APPLICANT: Thank you, Your Honor. Yes. I -- I
14 previously asked to represent myself. And the judge said
15 that I could bring it up at the -- when I come up for my
16 next PCR hearing, whenever that was scheduled. So that was
17 that.

18 And my father had -- was also my attorney-in-fact.
19 And he had sent a letter, asking to relieve her because he
20 felt like that it would interfere with the contract between
21 him and I.

22 As far as the summary judgment motion, I filed a
23 motion for summary judgment because there was no material
24 facts in dispute and -- and the case could be resolved by
25 look at the transcript alone. Because everything that's

1 take -- took place, took place on the record. And the
2 ineffective assistance of counsel on appeal for failing to
3 raise an issue, the case law says, can be resolved without
4 a hearing because it comes down to what the prior case law
5 says.

6 And -- and in this particular case -- or one issue,
7 for example, is there was a dispute as to whether the crime
8 occurred in Spartanburg or Greenville. And I asked the
9 judge to submit that question to the jury with proper
10 instructions, and he refused to do -- do so. He said
11 that's a question of law. And that's a legal error right
12 there. Where a crime occurred is a question of fact for
13 the jury to -- to decide.

14 And so that should've been raised. That's reversible
15 error that was supported by the evidence in the record and
16 should've -- should've been charged to the jury. That
17 allowed the jury to convict me, even if they only believed
18 that I possessed the stolen goods in Greenville.

19 And the case law -- prior case law says that that's
20 reversible error if it's supported by the evidence in the
21 record. If it goes to the defendant's defense or a dispute
22 in the evidence or its belief by the jury would entitle the
23 defendant to be acquitted, that it's prejudice not to have
24 given that charge.

25 So as far as appellate defense case law, in *Southerner*

1 v. State, the South Carolina Supreme Court said that in
2 reviewing whether or not it's ineffective assistance of
3 counsel for failing to raise an issue like that, you can
4 look simply to the record and to the prior case law. And
5 if the case law -- prior case law says that it's reversible
6 error, then it's inherently prejudicial for the attorney
7 not to have raised that issue on appeal.

8 And so I felt that those claims -- my claims dealing
9 in my PCR could be resolved without an extensive hearing --
10 you know, two- or three-hour-long hearing because it's all
11 in the record. And it doesn't really matter what I say.
12 It doesn't matter what the attorney says. Because it's all
13 in the record. And it's -- the law controls whether or not
14 it was ---

15 THE COURT: Okay.

16 THE APPLICANT: --- ineffective assistance of counsel.

17 THE COURT: As far -- so you want -- as far as your
18 PCR hearing is concerned right now, you want -- you want to
19 represent yourself ---

20 THE APPLICANT: Yes, sir.

21 THE COURT: --- and Ms. Moody's not representing you?

22 THE APPLICANT: Yes, sir, if you'll allow it.

23 THE COURT: Okay. Any objection from the state?

24 MS. OLIVE: No objection, Your Honor.

25 THE COURT: Okay. Any objection from you, Ms. Moody?

1 MS. MOODY: No, sir.

2 THE COURT: All right. I'll grant your motion. So it

3 ---

4 THE APPLICANT: Thank you.

5 THE COURT: So you're telling me now that you want me
6 to decide this on the record that your appellate was
7 ineffective? Because obviously, your trial couldn't be
8 ineffective, right?

9 THE APPLICANT: Right.

10 THE COURT: Because that was you.

11 THE APPLICANT: That was me.

12 THE COURT: Okay. So do you have anything you want to
13 present to me -- do you -- is the -- is -- is the entire
14 record in the box?

15 MS. OLIVE: Your Honor, I believe it is. I'm not sure
16 if his most recent motion for summary judgment ---

17 THE APPLICANT: I have -- I have a copy of that for
18 the judge.

19 THE COURT: Okay.

20 (Whereupon, Ms. Moody and the applicant conferred.)

21 THE COURT: How much -- so ---

22 MS. OLIVE: Your Honor, does he need to be sworn? Has
23 he been sworn?

24 THE COURT: No. He's not testifying.

25 MS. OLIVE: Okay. I just didn't know, since he's ---

1 THE COURT: I mean, he -- right now he is a lawyer.
2 He's not testifying. If he's going to give me any -- I'm
3 just trying to procedurally find out ---

4 MS. OLIVE: Well, Your Honor, I'll -- I'll give you a
5 brief background. Mr. Tinsley was indicted in 2007 for
6 receiving stolen goods. He ultimately proceeded pro se
7 with Andrea Price as standby counsel. He did go to trial
8 November 10th, 2010, representing himself and was found
9 guilty.

10 He was sentenced -- Judge Couch sentenced him to ten
11 years, suspended on the service of three years, to five
12 years' probation. And that order -- I'm sorry. That
13 sentence was ordered to run consecutively to sentences
14 received -- to sentences from -- arising out of Oconee
15 County incidents.

16 He did file a notice of appeal on his own behalf. But
17 that -- that appeal was perfected by Dayne Phillips. He
18 filed a brief on Mr. Tinsley's behalf. And ultimately, the
19 Court of Appeals affirmed his conviction and sentence.

20 THE COURT: Okay. The -- how much time was -- was he
21 served -- did you serve in Oconee County?

22 THE APPLICANT: They -- they gave -- they gave me
23 fourteen years: two seven years running wild, basically.

24 THE COURT: Are they consecutive?

25 THE APPLICANT: Yes. Consecutive. Yes, sir.

1 THE COURT: And then, you got this -- this one
2 consecutive ---

3 THE APPLICANT: Three years.

4 THE COURT: --- on top?

5 THE APPLICANT: Right. Three years. Seventeen
6 altogether.

7 THE COURT: Okay. And how far -- how much time do you
8 have left?

9 THE APPLICANT: About another year.

10 THE COURT: Well, you understand, if I grant your
11 relief, you're starting over?

12 THE APPLICANT: Yes, sir.

13 THE COURT: And so you could come back and face more
14 time.

15 THE APPLICANT: I understand, Your Honor.

16 THE COURT: And you still want to proceed, though?

17 THE APPLICANT: Absolutely. I was -- I was offered
18 time served if I'd plead guilty to begin with. And I
19 wouldn't take it because I'm innocent. And I don't want --
20 I don't want a felony criminal conviction on my record that
21 I'm innocent of.

22 THE COURT: What about your Ocone ---

23 THE APPLICANT: I'm -- I'm -- I have a PCR on it too.
24 I'm waiting any day now to have a hearing on that.

25 THE COURT: Okay. All right. Any -- and I have the

1 record, then, is what you're telling me from the trial?

2 THE APPLICANT: I haven't given you the record. The
3 -- I was told that she had to -- she would provide the
4 record ---

5 THE COURT: Right.

6 THE APPLICANT: --- the transcript; is that correct?

7 MS. OLIVE: Yes.

8 THE COURT: And I do have that.

9 THE APPLICANT: Okay.

10 MS. OLIVE: Yes, Your Honor.

11 THE APPLICANT: And then ---

12 THE COURT: Okay.

13 THE APPLICANT: --- I have -- I -- I have ---

14 THE COURT: And you ---

15 THE APPLICANT: --- provided ---

16 THE COURT: --- gave me ---

17 THE APPLICANT: --- in that ---

18 THE COURT: --- your motion for summary judgment?

19 THE APPLICANT: Excuse me?

20 THE COURT: I'm sorry. I didn't mean to cut you off.

21 You gave me your motion for summary judgment?

22 THE APPLICANT: Right. And the appendix -- there was
23 an appendix with a -- a -- the motions and orders and stuff
24 that took place in the trial to support the motion ---

25 THE COURT: Okay.

1 THE APPLICANT: --- everything I think that you would
2 need.

3 THE COURT: All right. I will read these and let you
4 know.

5 MS. OLIVE: Your Honor, I just want to clarify if Mr.
6 Tinsley is just going forward on his ineffective assistance
7 of appellate counsel claim.

8 THE APPLICANT: No.

9 THE COURT: That ---

10 THE APPLICANT: All of them that's in -- that's in the
11 motion.

12 MS. OLIVE: Okay. At that time -- I mean, in that
13 case, Your Honor, Mr. Tinsley makes a number of -- of
14 allegations. It's our position -- and -- and I would move
15 for a dismissal of the first -- of -- of his first set of
16 claims. And it's in your return, Your Honor. It's -- he
17 outlines them as trial-court error. And it's -- it's
18 Letters A through H.

19 Your Honor, it's our position -- those are all direct-
20 appeal issues. And -- and I'm certain -- and if you were
21 to review them under a summary judgment standard, the
22 record makes clear that -- that these -- I mean, there is
23 no issue in dispute with regard to those issues ---

24 THE COURT: Okay.

25 MS. OLIVE: --- anyway. And he also makes an

1 allegation that trial counsel refused to assist him. I --
2 I'd -- well, we would also move to dismiss that as well.
3 And I don't think there's any duty -- there's no -- I mean,
4 he -- he elected to proceed pro se.

5 The -- there's no Sixth Amendment for -- to advisory
6 counsel to a criminal defendant who chooses to exercise the
7 right to self-representation by proceeding pro se. And
8 that is *United States v. Lawrence* ---

9 THE COURT: Okay.

10 MS. OLIVE: --- 161 F.3d 250.

11 THE COURT: Do -- do you want to address that?

12 THE APPLICANT: That's not exactly the issue. The
13 issue was that I didn't knowingly and intelligently waive
14 the right to counsel. And -- and -- and then, the judge
15 ordered her to assist me anyways. And then she didn't.

16 MS. OLIVE: Your Honor ---

17 THE APPLICANT: And ---

18 THE COURT: Well, and -- but the judge explained to
19 you on the record in that ---

20 THE APPLICANT: No, sir ---

21 THE COURT: --- that ---

22 THE APPLICANT: --- he didn't.

23 THE COURT: I mean, I got a copy of the transcript.
24 And I read that, that you -- that she does not work for
25 you; that you're representing yourself; that any subpoenas

1 or anything, you have to go through the Court; she's only
2 there to give you legal advice if you ask.

3 THE APPLICANT: I -- I'm referring to when -- when I
4 asked to represent myself with the assistance of counsel.
5 So I didn't -- I didn't -- and I specifically said that I
6 wanted assistance of counsel if I represent myself. So
7 that was kind of a condition.

8 And so the judge never said, "Well, we can -- we can"
9 -- he never gave me a warning or anything that said, "We
10 can force you to stand trial without the assistance of
11 counsel." And so that was -- had I known that, I -- I
12 wouldn't have represented myself.

13 The whole purpose of it was because the attorney that
14 I had to begin with -- it'd been two years -- hadn't
15 interviewed any of my witnesses, hadn't come to speak to
16 me. And it'd been two years she'd had the case.

17 And so I was trying to find an alternative way to get
18 access to those witnesses and interview them. Because I
19 didn't -- I didn't know what they would say. But that was
20 the only defense I would have, would be -- be what
21 information they had, because they were the ones that was
22 present and around when that took place.

23 And so I -- based on prior case law that I had read
24 that said that I had the right to assistance of standby
25 counsel even if I'm representing myself and that the Court

1 has to provide me with the means to prepare my defense,
2 such as a standby counsel, if I don't have direct access to
3 a law library, I decided that I would ask to represent
4 myself with assistance of standby counsel.

5 And I figured the Court would either appoint me new
6 counsel or instruct her to act to assist me. And that's
7 what the order says. The judge came back and filed the
8 order, saying, "Yes. I'm telling you to do that."

9 But then she didn't do any of those things.

10 MS. OLIVE: And if -- Your Honor, if I may,
11 unfortunately, I -- I did try to obtain the transcript of
12 the initial hearing in which Mr. Tinsley relived -- asked
13 for counsel to be relieved or elected to proceed pro se.
14 However, that was a 2009 hearing. The court reporter no
15 longer has the tapes for that hearing, so I don't ---

16 THE COURT: Okay.

17 MS. OLIVE: --- have the transcript, unfortunately.

18 THE COURT: Well, the problem -- now, you first tell
19 me you want to represent yourself and you want -- and it's
20 all on the record and it's -- it's an appellate issue. Now
21 you got an issue that your standby counsel was ineffective
22 because she didn't help you. Now, that's a whole different
23 ball game. I got to take testimony on that.

24 THE APPLICANT: I didn't say that standby counsel was
25 ineffective. That's not one of my issues. That's not one

1 of my issues.

2 THE COURT: Are you saying that -- that the judge
3 should not have given you a standby counsel and should not
4 have let you represent yourself?

5 THE APPLICANT: No. I'm saying that I -- that I
6 didn't knowingly and intelligently waive the right to
7 counsel. But look at this way: You don't have to grant
8 relief on the summary judgment on all the issues. You can
9 grant two or three ---

10 THE COURT: Okay.

11 THE APPLICANT: --- of them in part and then, you know
12 ---

13 THE COURT: Okay.

14 THE APPLICANT: --- if it's necessary ---

15 THE COURT: I ---

16 THE APPLICANT: --- we can do a hearing ---

17 THE COURT: I'll go ---

18 THE APPLICANT: --- on it.

19 THE COURT: --- through and -- I understand the
20 state's position. I'll read it and follow the law ---

21 THE APPLICANT: Right.

22 THE COURT: --- as much as I can.

23 THE APPLICANT: Okay. And -- and I'd like to add, I
24 got a affidavit that's in that that covers a lot of this
25 stuff also.

1 THE COURT: Okay.

2 THE APPLICANT: Okay.

3 THE COURT: Thank you, sir.

4 THE APPLICANT: Thank you, Judge.

5 MS. OLIVE: Thank you, Your Honor. And I'm -- I'm
6 glad to brief anything you'd like me to as well.

7 THE COURT: Okay. I'll -- I'll leave the record open.
8 And if I need anything, I'll let both of you know to let --
9 after I reviewed it.

10 MS. OLIVE: Thank you, Your Honor.

11 THE APPLICANT: Thank you, Judge.

12 THE COURT: Okay.

13 (Whereupon, the proceeding was concluded at 5:40 p.m.)

14 --- END OF TRANSCRIPT OF RECORD ---
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CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED
VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT,
OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND
COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT
COURT FOR SPARTANBURG COUNTY, SOUTH CAROLINA, ON THE
13TH DAY OF JANUARY, 2016.

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



MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JANUARY 10, 2018

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

James Tinsley, Jr.,

Case No.: 2014-CP-42-0384

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for post-conviction relief, filed February 7, 2014. Respondent filed its Return on September 8, 2014. A hearing was convened into the matter on January 13, 2016. Applicant was present and was represented by Leah Moody, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. At the hearing, Applicant moved to relieve Leah Moody as PCR counsel. The Court granted the motion.

At the same hearing, Applicant asked the Court to grant summary judgment in his favor, stating that he did not believe a hearing was necessary. Respondent moved to dismiss all matters except Applicant's allegation that his waiver of counsel was involuntary. Respondent argued that the claim of involuntary waiver of counsel was the only claim Applicant had raised that was potentially meritorious, but submitted the Court could determine based from the record alone that Applicant's waiver of counsel was knowing and voluntary.

The Court had before it a copy of the Order relieving counsel filed March 3, 2009, the transcript of the hearing before the Honorable J. Derham Cole on April 13, 2010, the trial transcript, Applicant's appellate records, the records of the Spartanburg County Clerk of Court

R. J. Cole

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regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings, and Applicant's Motion for Summary Judgment.

I. PROCEDURAL HISTORY

Applicant is not currently incarcerated. He was indicted at the October 2007 term of the Spartanburg County Grand Jury for receiving stolen goods (2007-GS-42-5031). Applicant proceeded pro se, with Andrea D. Price, Esquire, as stand-by counsel. On November 10, 2010, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for a term of ten years, suspended upon the service of three years to five years of probation. Judge Couch ordered the sentence to be served consecutively with Applicant's July 31, 2008, convictions in Oconee County.

A timely notice of appeal was filed by Applicant on his own behalf and an appeal was perfected by the Office of Appellate Defense. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Tinsley, Op. No. 2012-UP-639 (filed Dec. 5, 2012). Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on January 8, 2014. The Remittitur was returned on February 25, 2014.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Trial court error, in that;
 - a. "Applicant was denied a fair trial when the trial judge failed to direct the verdict where the evidence did not establish that the 'stolen goods' were received or possessed on or about the exact date of the indictment,"
 - b. "Applicant was denied a fair trial when the trial judge refused to direct the verdict where the evidence required the jury to stack inferences upon inference and the court lacked venue,"

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- c. "Applicant was denied due process of law and a fair trial when the trial judge failed to charge the jury on the law and to inform them that they must find Applicant not guilty if they determine that he stole the camper himself,"
 - d. "Applicant was sentenced inappropriately when he was required to pay restitution in excess of the proven damages,"
 - e. "Applicant did not knowingly and intelligently waive his right to counsel,"
 - f. "Applicant was denied a fair trial and his right to confront witnesses against him when the trial judge prevented the Applicant from questioning a State witness, Ben Lindler, concerning his dishonest conduct where the testimony would have went to the witness's credibility,"
 - g. "Applicant was denied a fair trial when the court refused to exclude a conversation with Detective Beck where the statement was given under duress, coercion, and threat of extended detainment and where the conversation was not related to the offense in question,"
 - h. "Applicant was denied a fair trial where the judge refused to charge the jury that when dealing with circumstantial evidence that points equally to guilty and innocence, such evidence must point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis,"
2. Denial of due process, in that;
- a. "Applicant was denied his due process rights when he was convicted based upon evidence that pointed equally to guilt and innocence on the indicted offense,"
 - b. "Applicant was denied due process, equal protection of the law and a fair opportunity to defend against the State's accusations, when his recalcitrant standby counsel refused to assist Applicant in trial preparation, and in developing his substantive case,"
 - i. On pages 3(o)-3(v) of the attachment to his application, Applicant details the manner in which he feels stand-by counsel was ineffective. Applicant references a hearing before Judge Couch in February 2009 in which Judge Couch granted Applicant's motion to relieve counsel and appointing Price as standby counsel.¹
 - c. "Applicant was denied a fast and speedy trial,"
3. Ineffective assistance of appellate counsel, in that;
- a. "Applicant was denied effective assistance of appellate counsel where counsel failed to raise all meritorious issues that could have been raised on appeal."

¹ Respondent informed the Court that the transcript of this hearing is not available because the tape had already been destroyed. The Court notes that the hearing was held February 2009 and the PCR application was filed five years later in February 2014.

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In the motion for summary judgment that Applicant presented to this Court on the date of his hearing, Applicant moved for summary judgment in this action, arguing "there are no material facts in dispute and [Applicant] is entitled to relief in his favor." The grounds asserted in the motion are as follows:

1. Ineffective assistance of appellate counsel, in that;
 - a. Counsel failed to raise the following issues on appeal:
 - i. "That the trial judge erred in failing to charge the jury with all the elements of the crime, or otherwise instruct the jury on the distinctions between larceny and receiving stolen goods, and that if they determine that Applicant stole the camper himself, they must find Applicant not guilty."
 - ii. "That the trial judge erred in refusing to allow Applicant to question State's witnesses Ben Lindler, concerning his taking money from a safe at Advanced Auto, blaming a Mexican for robbing him and then pointing a finger at Applicant while suggesting himself to be the victim."
 - iii. "The trial judge erred by refusing to direct verdict as to venue, or otherwise instruct the jury that a dispute existed as to venue and that they must make that decision and if they find that camper was received or possessed in Greenville County, they must find Applicant not guilty. This failure allowed the jury to stack inference upon inference and required them to speculate to find guilt."
 - iv. "The trial judge erred in failing to exclude testimony of Detective Beck concerning an investigation and conversation that was related to another case."
 - v. "That Applicant was denied his Sixth Amendment Rights to a Fast and Speedy trial."
 - vi. "Applicant was denied his Sixth Amendment Right to Counsel because he did not knowingly, intelligently or voluntarily waive his right to counsel."
2. Applicant was denied his Sixth Amendment right to Counsel where he did not Knowingly, Intelligently, or Voluntarily waive his right to counsel.
3. Applicant was denied due process of law, in that
 - a. By not being provided with the resources necessary to conduct pretrial legal research or trial preparations.
 - b. Applicant was denied due process of law when the State failed to disclose things of value offered to Ben Lindler in exchange for his testimony against Applicant and when the prosecution failed to correct false testimony he knew or should have known was false when it occurred.
 - c. Evidence not previously heard requires the reversal of the

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conviction in the interest of justice, where the state relied upon false testimony and false impressions to establish the elements of the offense or that went to the truthfulness and credibility of the State's witness.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to section 17-27-70 of the South Carolina Code of Laws, this Court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, and admissions . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. S.C. Code Ann. § 17-27-70.

This Court has reviewed the entire record and has considered the arguments of the parties. This Court finds that Applicant's application for post-conviction relief must be denied and dismissed Pursuant to section 17-27-70 because there is no genuine issue as to any material fact and Respondent is entitled to judgment as a matter of law.

Summary judgment is proper where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). In determining whether summary judgment is appropriate, this Court must view "the evidence and its reasonable inferences . . . in the light most favorable to the nonmoving party." Baughman, 306 S.C. at 115-16, 410 S.E.2d at 545-46 (citing SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990)). This Court must then apply the following standard set out in Rule 56(c):

The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof.

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Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115-16, 410 S.E.2d 537, 545-46 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). In a PCR action, the applicant bears the burden of proving the allegations in his 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)).

A. Invalid Waiver of Right to Counsel

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 (1975)). Although a defendant's decision to represent himself may be to his own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law," Id. The proper inquiry is whether the record demonstrates that Applicant "made an informed choice to proceed *pro se*, with 'eyes open,'" in ruling on whether he made a knowing and voluntary waiver of counsel. 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 examine 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 factors including: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was 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 charges 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, 351 S.C. at 412-13, 570 S.E.2d at 186-87.

Here, Applicant was represented by counsel for a significant amount of time before trial and was appointed standby counsel in 2009. Applicant repeatedly expressed both his desire to represent himself and his understanding of the risks and dangers of self-representation. Applicant stated to the trial judge that "[f]rom the very beginning I've maintained that I've wanted to waive my right to an attorney[.]" Tr. I p. 83. Applicant made several motions and objections throughout the course of the trial. Applicant made multiple pretrial motions including the following: (1) a motion to suppress based on illegal search and seizure of the camper in violation of the Fourth Amendment, (2) a motion to dismiss the charges based on a due process violation because he did not receive a fair opportunity to defend against the State's accusations due to standby counsel's lack of assistance with legal research or interviewing witnesses; (3) a motion to dismiss the charges against him based on the alleged denial of his right to a speedy trial; (4) a motion to exclude any evidence of Applicant's prior bad acts; (5) a motion to exclude prior convictions; (6) and a motion to dismiss based on improper venue. The trial judge observed during the pretrial motions that Applicant had submitted a "legal brief that was very effective and well-researched." Tr. I. p. 86. The trial judge also observed: "it stretches your credibility with me to tell me that you haven't had an opportunity to consider the case or do research and you're about to present me with motions in limine and things of that nature. So, it appears to me you've had an opportunity

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to look into your case." Tr. I p. 90. Applicant and the trial judge also had the following exchange:

THE COURT: Yes, for a gentleman that had no access to the legal system. . .

...
you're pretty astute.

MR. TINSLEY: [My cousin] was a federal judge down in Atlanta, Georgia. And so, I spent a lot of my life studying the law and stuff, but it's mostly civil stuff. But I have a pretty good memory about how some things work.

THE COURT: Again, my, my observation is that you're pretty astute with what you've presented to the Court, and I'll just make that observation again and stand by my previous ruling on that issue.

Tr. I p. 122, lines 4-19.

In addition, in his opening statement to the jury, Applicant stated:

My decision to represent myself is based upon 20 years of experience. I spent a good portion of my life in civil rights litigation, and because of these experiences, over the years, I've learned a thing or two about the law. Although my background is been civil law rather than criminal law, when you get right down to it, it really is all just common sense.

...
"When I became older, and I started studying the law, I began to realize that what attorneys were trying to say meant everything. They were simply trying to explain the elements that constitute a crime. Now, they don't always do a very good job of this, and hence the reason I want to represent myself.

Tr. I pp. 166-167.

Applicant also requested several jury instructions and made a motion for a directed verdict. Though Applicant argued that he was not given an opportunity to do legal research to come up with legal challenges he could raise in defense of the charges against him, he did make a motion to suppress the camper on the grounds that there was an illegal search and seizure, and sought to discredit State's witnesses' credibility at trial. Applicant was also previously involved in a criminal trial. Specifically, he was convicted after representing himself on similar charges in

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Oconee County. Judge Couch noted that in that case, "[o]bviously, . . . there [had been] a finding by that court that [Applicant] had knowingly and intelligently waived [his] right to counsel and exercised [his] right to proceed *pro se*." Tr. II p. 5, lines 8-22.

This Court finds that, in applying the Gardner factors to Applicant's case, the record clearly demonstrates that Applicant made the decision to proceed without counsel with eyes open, and Applicant has produced no evidence in support of his allegation that his decision to waive his right to counsel was not knowing and voluntary. Applicant's various statements to the court and the jury throughout the proceedings before and during trial, as well as Applicant's performance at trial indicates that he had a sophisticated knowledge of the workings of the legal system at the time of his trial and was fully aware of the dangers and advantages of waiving his right to counsel and proceeding *pro se*. This Court notes that Applicant tried to have Dayne Phillips removed as his appellate counsel and then made multiple *pro se* motions to relieve PCR counsel in this action, which this Court ultimately granted. In viewing the pleadings and record in the light most favorable to Applicant, this Court finds there is no genuine issue of material fact as to whether Applicant knowingly and voluntarily waived his right to counsel and Respondent is entitled to judgment as a matter of law. This allegation is therefore denied and dismissed.

B. Ineffective Assistance of Standby Counsel

Applicant alleges he was "denied due process, equal protection of the law and a fair opportunity to defend against the State's accusations, when his recalcitrant standby counsel refused to assist Applicant in trial preparation, and in developing his substantive case."

Viewing the evidence in the light most favorable to Applicant, this Court finds Respondent is entitled to judgment as a matter of law and therefore this allegation must be denied and dismissed. Applicant was not entitled to standby counsel. Because "the matter of

hybrid representation is left to the discretion of the trial judge, then, by implication, there is no Sixth Amendment right to hybrid representation." State v. Stucky, 333 S.C. 56, 57, 508 S.E.2d 564, 564 (1998). "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) (citing United States v. Singleont, 107 F.3d 1091, 1110 (4th Cir. 1997); McKaskie v. Wiggins, 465 U.S. 168, 183 (1984)). See also United States v. Mikolajczyk, 137 F.3d 237, 246 (5th Cir. 1998) (holding since defendant "had no right to standby counsel, it seems unlikely that standby counsel's failure to assist could be a violation of his Sixth Amendment rights"); United States v. Bova, 350 F.3d 224, 226 (1st Cir. 2003) (noting defendant had no right to both "represent himself *and* to enjoy the benefit for standby appointed counsel"). Likewise, "there is no right under the South Carolina Constitution to hybrid representation. Stucky, 333 S.C. at 57, 508 S.E.2d at 564 (citing Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)). Further, "[p]lacing reasonable limits on the advice to be given by standby counsel that the court was under no obligation to provide in the first instance does not constitute an abuse of discretion." Lawrence, 161 F.3d at 253.

On pages 3(o)-3(v) of the attachment to his application, Applicant details the manner in which he feels standby counsel was ineffective. Applicant refers to a hearing before Judge Couch in February 2009 in which Judge Couch granted Applicant's motion to relieve counsel and appointed Price as standby counsel. A later hearing was held before the Honorable J. Derham Cole on April 13, 2010. At that hearing, Applicant acknowledged he was representing himself therefore did not have an attorney who represented him and could not dictate the manner in which standby counsel assisted Applicant in pre-trial preparation. The following exchanges took place between Judge Cole and Applicant: Applicant affirmed that he was representing himself,

that it was his request to do so, and that nothing had changed in that regard. April 2010 Tr. 5:19-25. Judge Cole also clarified to Applicant at the hearing that "Ms. Price is what's referred to . . . as standby counsel" and that "she's here while this trial is in progress or whatever to answer questions if you have. But she's not representing you. She doesn't work for you." Applicant agreed and stated that he understood. Applicant stated that he thought it was standby counsel's job to "subpoena witnesses and things of that nature." Judge Cole further clarified that "Ms. Price is not doing that. She doesn't work for you." Applicant replied: "I agree. That's fine. I agree I don't have the right to dictate which method is provided to me. If the Court will [subpoena witnesses], that's fine with me."

Applicant made a valid waiver of his right to counsel and was therefore not entitled to hybrid representation. It is clear Applicant understood that standby counsel was not representing him. Viewing the evidence in the light most favorable to Applicant, this Court finds Respondent is entitled to judgment as a matter of law with respect to this allegation. Accordingly, this allegation is denied and dismissed.

C. Ineffective Assistance of Appellate Counsel

Applicant alleges he was denied effective assistance of appellate counsel in that appellate counsel failed to raise all meritorious issues that could have been raised on appeal. 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). Applicant must show (1) that appellate counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citing

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Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). Further, the courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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)). Counsel is not required to raise every non-frivolous claim, but instead may select among them to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259 (2009). "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) (finding the failure to appeal all trial errors is not ineffective assistance where strategic decision to exclude issues on appeal is based on reasonable professional judgment).

When a claim of ineffective assistance of appellate counsel is based on 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. the issue is not preserved for appeal, appellate counsel cannot be ineffective for not raising that issue on appeal. See State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) (holding

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where an objection and the ground therefore is not stated in the record, there is no basis for appellate review).

Here, the issue Appellate Counsel raised on appeal was whether the trial court erred in finding the warrantless seizure of the stolen camper was proper and in allowing the stolen camper's owner to testify regarding the stolen camper's VIN number. Applicant asserts that appellate counsel should have also raised the claims he asserts above in 1(b),(c),(f)-(h) and 2(a),(c). However, many of these arguments were either waived by Applicant at trial or were otherwise not properly preserved for appeal. Specifically, Applicant's allegation that appellate counsel was ineffective for failing to argue that the Court erred in refusing to allow Applicant to question Lindler about giving a false police report, Tr. I p. 286. At trial, Applicant told the judge that he wanted to question Lindler about robbing his own store and then giving a false statement to police in which he stated that "a Mexican robbed him." Tr. I p. 280. The State argued that Lindler was not convicted of giving a false statement to police and the statement would not be admissible. The trial judge ruled that he could ask Lindler if he gave a false statement to police and what his motivation was for doing so, but he could not ask him the specifics of it. Tr. I p. 286. Applicant then asked Lindler if he made a false statement and what his motivation for doing so was. Therefore, appellate counsel had no basis to appeal this issue.

Applicant states in his application on page "3(mm)" that he wanted to represent himself on appeal and he attempted to raise some of the issues "contained herein" for appellate review. However, Applicant's request to proceed *pro se* was denied, and Dayne C. Phillips was appointed to represent him. Applicant goes on to state that he sent Phillips "several letters requesting that he brief the issues Applicant had prepared." See PCR Application page "3(mm)." Applicant has made no allegation that appellate counsel did not receive this correspondence. The only

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reasonable conclusion to be drawn from the record is that Appellate Counsel was aware of these arguments, yet chose to proceed with only the argument pertaining to the search. If the appellate courts had found that the trial judge erred in admitting the evidence of the VIN number, Applicant's conviction would have likely been reversed. See Mapp v. Ohio, 367 U.S. 643 (1961) (holding evidence seized in violation of the Fourth Amendment must be excluded from trial).

Accordingly, because this Court must presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, Strickland, 466 U.S. 668, this Court finds that appellate counsel chose to assert the claim he found to be most meritorious. Furthermore, though he argues that appellate counsel could have made other arguments, Applicant has presented no showing of how they would have affected the outcome of his appeal. Therefore, this Court finds that appellate counsel raised the issue that had the greatest chance of being successful on appeal.

This Court finds, in viewing the record in the light most favorable to Applicant, there is no genuine issue of material fact with regard to Applicant's allegation that appellate counsel failed to raise issues on appeal, and it is therefore denied and dismissed.

D. Trial Court Error

Applicant alleges multiple errors at the trial court level in the claims set forth in his original PCR application in paragraphs 1(a)-(h) and 2(a)-(c). This Court finds that Applicant explicitly abandoned each of the issues set forth in 1(a)-(c),(f),(g) at trial. Regardless, all of these claims as well as claims in paragraphs 1(d),(h) are direct appeal issues. S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A PCR application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 901 (1973).

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Applicant represented himself at trial. He could have raised these issues at trial. His failure to do so has waived these allegations as grounds for relief. Therefore, viewing the facts in the light most favorable to Applicant, this Court finds there is no genuine issue of material fact and Respondent is entitled to Judgment as a matter of law.

Applicant's allegation that the judge failed to appropriately charge the jury is without merit. Further, this is a direct appeal issue that Applicant waived by not objecting at trial. See Simmons, 264 S.C. 417, 215 S.E.2d 883; Ashley, 260 S.C. 436, 196 S.E.2d 501. This Court notes the trial judge appropriately charged the jury on the elements of receiving or possessing stolen goods. Tr. II p. 127, lines 7-22. Applicant's main complaint at trial was that judge refused to charge the jury on the doctrine of recent possession because it would go against Applicant. Tr. II p. 75, lines 11-15. Applicant then agreed that he could leave that out. Tr. II p. 77. Applicant asked that the trial judge charge the jury using the specific language in Horne, which the trial judge agreed to do, (Tr. p. 70), but then determined that pursuant to State v. Grippon it would not charge the reasonable hypothesis charge that Applicant requested. (Tr. II p. 79). Applicant also requested a mere presence instruction, which the trial judge agreed to charge. Regardless, Applicant did not object to the jury charges after the trial judge specifically asked him if he had any objections to the final jury instruction. Tr. II p. 130, lines 6-20; Tr. II p. 132, lines 8-9. Accordingly, this Court finds there is no genuine issue of material fact as to this issue and the State is entitled to judgment as a matter of law.

Applicant also alleges the trial judge erred in refusing to allow him to cross-examine the State's witness, Ben Lindler, concerning Applicant's contention that Lindler had burglarized Applicant's home. Applicant specifically asked the court to allow him to question the witness on that matter. Trial Tr. I p. 256, line 24-p. 294, line 16. The parties then engaged in lengthy

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discussion with the trial judge and the trial judge ruled that he was not going to allow him to question Lindler about the alleged burglary because Lindler was not convicted. However, the trial judge did permit Applicant to question Lindler concerning whether they had disputes in the past to show bias or prejudice on Lindler's part pursuant to Rule 608(c), SCRE. Trial Tr. I, pp. 230-50. The trial judge allowed him considerable latitude and even overruled the State's objection, but ultimately stopped him from going into the specifics of the accusation. Accordingly, this Court finds there is no genuine issue of material fact as to this issue and the State is entitled to judgment as a matter of law.

Applicant also alleges that the trial judge erred in refusing to suppress his statement to Detective Beck because the statement was involuntary and not relevant. This is also a direct appeal issue that could have been raised either at trial or on appeal. In fact, Applicant did raise the issue at trial, and a hearing was held on the voluntariness of the statement. Applicant and Beck both testified. The State argued that Applicant refused to sign the statement and did not confess. The judge denied Applicant's motion to suppress. This issue was not raised in Applicant's direct appeal. Therefore, Applicant has waived this allegation. See S.C. Code Ann. § 17-27-20(b) (1985); Ashley, 260 S.C. 436, 196 S.E.2d 501 (holding a PCR application cannot assert any issues that could have been raised at trial or on direct appeal). Accordingly, this Court finds there is no genuine issue of material fact as to this issue and the State is entitled to judgment as a matter of law.

E. Due Process

Applicant alleges he was denied due process on the grounds that he was denied his Sixth Amendment right to a fast and speedy trial. “[A] speedy trial does not mean an immediate one; it does not imply undue haste, for the State, too, is entitled to a reasonable time in which to prepare

its case; it simply means a trial without unreasonable and unnecessary delay.” State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012), (citing Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)). “Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.” State v. Evans, 386 S.C. 418, 423, 688 S.E.2d 583, 586 (Ct. App. 2009) (quoting State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007)). A reviewing court should consider the following factors when determining whether a defendant has been deprived of his right to a speedy trial: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant. Id. at 423, 688 S.E.2d at 586. Delays occasioned by the defendant, . . . weigh against him. This is not only in accord with the reality that delay may be a defense tactic, but it is also a recognition that a defendant should not be able to procure a dismissal of the charges against him due to delays he caused. State v. Langford, 400 S.C. 421, 443, 735 S.E.2d 471, 483 (citing Vermont v. Brillon, 556 U.S. 81 (2009)) (citations omitted). Further, a court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. State v. Langford, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (citing See State v. Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct.App.2007)). Here, Applicant was indicted in 2007. Applicant made multiple motions to relieve counsel before he went to trial, thereby contributing to the delay. Applicant made no showing that he suffered prejudice by the delay. Regardless, this allegation is a direct appeal issue which Applicant waived by not raising in his direct appeal. Accordingly, this Court finds that viewing the facts in the light most favorable to Applicant, there is no genuine issue of material fact as to this issue and the State is entitled to judgment as a matter of law.

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In his motion for summary judgment, Applicant alleges he was also "denied due process of law when the State failed to disclose things of value offered to Ben Lindler in exchange for his testimony against Applicant and when the prosecution failed to correct false testimony he knew or should have known was false when it occurred." However, Applicant has failed to provide specific facts as to what Lindler was offered or what false testimony Lindler provided and has produced no evidence that Lindler gave false testimony or received any kind of deal or leniency from the State. At trial Applicant asked Lindler if he had any deals with the police and Lindler replied that he had "no deals. No pats on the backs, no easy rides, nothing." Tr. I p. 287. Applicant has made no showing whatsoever that Lindler provided false testimony. Therefore, this Court finds there is no genuine issue of any material fact with respect to this allegation. Therefore, it is denied and dismissed.

Applicant also alleged he was denied due process of law by not being provided with the resources necessary to conduct pretrial legal research or trial preparations. The trial judge noted how prepared Applicant was when he made his pretrial motions. Applicant cited multiple rules and laws throughout his trial and made many motions and objections. This Court finds the record clearly shows there is no genuine issue of material fact with respect to this allegation and it is therefore denied and dismissed.

Applicant lastly alleges that he was denied due process of law because "[e]vidence not previously heard requires the reversal of the conviction in the interest of justice, where the State relied upon false testimony and false impressions to establish the elements of the offense or that went to the truthfulness and credibility of the State's witness." However, Applicant has failed to allege any specific facts or produce any evidence in support of this allegation. Accordingly, in

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viewing all facts in the light most favorable to Applicant, this Court finds Respondent is entitled to judgment as a matter of law and this allegation is therefore denied and dismissed.

CONCLUSION

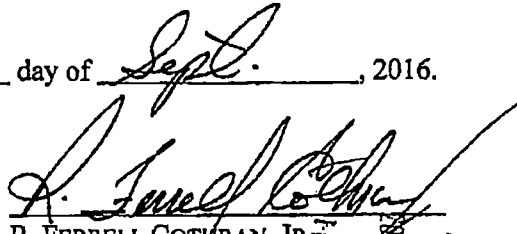
Based on the foregoing, this Court finds that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. Further, Applicant's motion for summary judgment is denied.

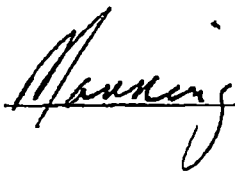
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRPC; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's 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 1 day of Sept., 2016.


 R. FERRELL COTHRAN, JR.
 Presiding Judge
 Seventh Judicial Circuit


 _____, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

James Tinsley,

Case No.: 2014-CP-42-0384

Applicant,

**ORDER DENYING APPLICANT'S
MOTION TO ALTER OR AMEND**

v.

State of South Carolina,

Respondent.

CLERK OF COURT
SPARTANBURG COUNTY
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HOPE BLACKLEY

This matter comes before the Court by way of an Application for post-conviction relief filed January 30, 2014. Respondent made its Return on September 8, 2014. The Court convened an evidentiary hearing into the matter on January 13, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. At the hearing, Applicant moved to relieve his PCR counsel, and the Court granted the motion. Respondent moved for summary dismissal of Applicant's PCR application. By written order filed September 12, 2016, the Court issued an order summarily dismissing the PCR application. On September 22, 2016, Applicant filed a "Motion to Alter or Amend" pursuant to Rule 59(e), SCRPC. Thereafter, Respondent made its return to the motion, requesting the motion be denied..

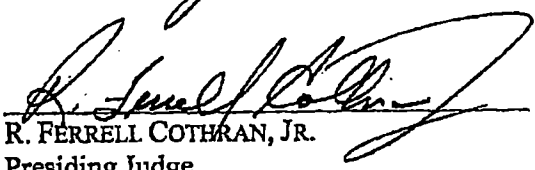
Based upon careful reconsideration of the record in this case, including the submissions of the parties, this Court has discovered no findings of fact or conclusions of law that have been overlooked or misapprehended, and this Court is not persuaded to alter or amend its judgment. Further, pursuant to Rule 59(f), SCRPC, this Court further finds oral argument would not aid in the reconsideration of the original judgment. The Order of Dismissal issued by this Court

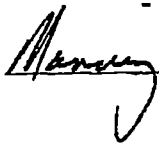


contains the required findings of fact and conclusions of law as required by subsection 17-27-70(c) and section 17-27-80 of the South Carolina Code of Laws, and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion is hereby **DENIED AND DISMISSED**.

AND IT IS SO ORDERED this 23 day of May, 2017.


R. FERRELL COTHAN, JR.
Presiding Judge
Seventh Judicial Circuit

, South Carolina

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WITNESSES

SPARTANBURG CO SHERIFF'S OFFICE

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

7. ASSESSMENT AND
FINE CARD MADE

K261598

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 10-26-07

VERDICT

guilty
MARC KITCHENS

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Foreperson of Grand Jury
Date: 11/14/2007
FILED

DOCKETING

07-GS-42-5031

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

OCT 29 2007

TERM

THE STATE

vs.

JAMES TINSLEY, JR

Indictment for
RSG/RECEIVING STOLEN GOODS

SC Code: 16-13-160 (3)

CDR Code: 514

Class FEL/E

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on OCT 26 2007 the
Grand Jurors of Spartanburg County present upon their oath:

RSG/RECEIVING STOLEN GOODS

That James Tinsley, Jr. did in Spartanburg County on or about October 11, 2006,
receive or possess stolen goods of Holiday Kamper, described as follows: a camper, of
the value of more than Five Thousand Dollars, such goods having been feloniously
taken and carried away with the intent to deprive the owner thereof permanently of such
goods, and the said defendant knew or had reason to believe such property had been
stolen, in violation of §16-13-0180 (3), *THE CODE OF LAWS OF SOUTH CAROLINA*,
(1976, as amended).

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


ASSISTANT SOLICITOR