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STATE OF SOUTH CAROLINA

In the Supreme Court

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

JAMES Tinsley,

Petitioner

vs.

STATE OF South Carolina,

Respondent.

APPELLATE CASE NO. 2017-002428

PETITIONERS PRO SE BRIEF AND MEMORANDUM IN opposition to Counsels Johnson Petition

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Issue Presented

Whether Appellate Counsel was ineffective in failing to raise the issue that the trial Judge erred in failing to instruct the jury on venue and that the jury must find Petitioner not guilty if they determine that Petitioner only possessed the Camper in Greenville County?

STATEMENT

Petitioner was convicted of receiving stolen goods (a camper) in Spartanburg County. The Camper had been stolen from Spartanburg County but was located in Greenville County at Petitioners Grandmothers home.

Petitioner filed an application for post-conviction relief. Judge Cothran issued an order denying and dismissing the PCR. Petitioner filed a Motion to Alter or Amend and a Supplemental Motion to Alter or Amend the PCR Judges decision because it failed to address all of Petitioners Claims or misconstrued the issues and/or Material Facts. Ignoring the issues the PCR Judge filed a final order denying Relief.

ARGUMENTS

Appellate counsel was ineffective in failing to raise the issue that the trial judge erred in failing to instruct the jury on venue and that the jury must find Petitioner not guilty IF they determine that Petitioner only possessed the Camper in Greenville County?

Certiorari Counsel has filed a Johnson Petition contending that Appellate counsel was ineffective in failing to argue that Petitioners directed verdict motion as to venue should have been granted.

Assuming Arguendo, that this COURT finds that some evidence existed that Petitioner could have possessed the camper in Spartanburg County and that directed verdict was properly denied, so as to allow the jury to make that determination, Petitioner contends that the jury was not instructed on venue and given the opportunity to decide for themselves whether the camper was possessed in Spartanburg or only Greenville County.

From the beginning Petitioner maintained that he traded Bill Dotson an enclosed race trailer and $10,000.00 for the Camper. (App. pg. 326, lines 4-17; App. pg. 335, lines 12-pg. 337, line 2; App. pg. 235, line 14-pg. 236, line 25). The enclosed trailer which looked almost identical (App. pg. 236, lines 18-25) was taken to Bill Dotson's shop in Spartanburg and the Camper was stored and later recovered from Petitioners Grandmothers home in Greenville County.

At trial Petitioner moved for directed verdict as to venue. The trial judge denied the motion because he believed some evidence existed that Petitioner had possessed the Camper in Spartanburg because it had been seen at Bill Dotson's shop. Apparently the trial judge failed to realize the distinction and what was actually seen at Bill Dotson's shop was the nearly identical enclosed trailer Petitioner had traded to Bill Dotson for the Camper.

Nevertheless, Petitioner attempted to have the trial Judge instruct the jury on venue and the ultimate outcome should they find that the Camper was only possessed in Greenville County. (App. pg. 445, lines 5 - pg. 446, line 6; pg. 455, lines 11 - pg. 458, line 15).

The trial judge refused to give a proper charge believing that Reading the indictment would be sufficient. What is wrong about this presumption is that it left the jury without any understanding that the Fact that Petitioner possessed the camper in Greenville County is completely insufficient to convict PETITIONER in Spartanburg County. The jury was left to believe that they could lawfully convict even IF Petitioner possessed the camper only in Greenville County. SEE: State v. Henerson, 329. S.E.2d 448, 451 (1985); State v. White, 44 S.E.2d 741, 743 (1947); State v. Durant, 70 S.E. 306, 306-07 (1911); State v. Clamp, 80 S.E. 2d 918 (1954); State v. Lyles, 41 S.E.2d 625 (1947); State v. McGee, 193 S.E. 303 (1937)

It was Reversible error not to fully instruct the jury on the law applicable to the case and IT Was ineffective assistance OF appellate Counsel not to Raise this issue on Appeal.

Applicant Filed A written motion For Summary Judgment which was denied during the PCR hearing. which addressed this issue that was presented in a Supplemental PCR Application. The PCR judge Failed to Address this issue in his initial order and Petitioner filed a motion and Supplemental motion

to Alter or amend. The PCR Judge filed a final order of Dismissal and never made a findings of fact or conclusions of law Regaeding this and many other issues proffered by Petitioner.

Conclusion

Because Appellate Counsel did not raise the issue that it was error not to properly charge the jury on venue during direct Appeal, Petitioner should have his conviction Reversed for ineffective assistance of Counsel.

James Tinsley

This 20th day of April, 2018

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CERTIFICATE OF SERVICE

I, James Tinsley hereby certify that I did cause the Foregoing to be served upon opposing counsel this 21st day of April, 2018, by placing a true and correct copy in the U.S. Mail with proper postage affixed thereto and addressed as follows:

South Carolina Office of Attorney General
Megan Harrigan Jameson
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Sworn and Subscribed to under the penalties of perjury.

James Tinsley

STATE OF SOUTH CAROLINA

In the Supreme Court

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Supplemental Appendix

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STATE OF SOUTH CAROLINA)	In The Court of Common Pleas
)	
COUNTY OF SPARTANBURG)	
	CASE NO: 2014-CP-42-384
JAMES TINSLEY, # 171943,)	
Applicant,)	
)	**APPLICANTS MOTION FOR SUMMARY JUDGEMENT**
vs.)	
)	
STATE OF SOUTH CAROLINA,)	
Respondent.)	
)	

COMES NOW, the above applicant, with his motion for summary judgement in the above entitled post-conviction relief action. Applicant would show this Honorable Court that there are no material facts in dispute and that he is entitled to relief in his favor under the governing law. Coker v. Cummings, 381 S.C. 45, 671 S.E.2d 383 (2008). Summary judgement is appropriate when further inquiry into the facts is not necessary to clarify the application of the law. Id. at 386.

A post-conviction relief action is a civil proceeding and the rules of civil procedure apply. See: S.C.R.Civ.P. 71.1; S.C. Code, § 17-27-80; and Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989). Applicant has raised a number of issues seeking relief, including claims involving ineffective assistance of appellate counsel. Generally, these claims require an evidentiary hearing, but when dealing with whether counsel was ineffective on appeal, these claims can be resolved by an examination of the record alone. See: Grey v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)("An evidentiary hearing is required only if a review of the record is not sufficient to resolve factual disputes regarding the choice of issues...when a claim...is based on a failure to raise issues on appeal, we note it is the exceptional case that could not be resolved on an examination of the record alone").

Here, the following issues raise only questions of law. The relevant facts are found in the court transcripts and records who's credibility cannot reasonably be questioned. For this reason, applicant believes that an evidentiary hearing is not required, Ballew v. State, 262 S.C. 393, 396, 204 S.E.2d 736, 737 (1974), and these issues are ripe for summary judgement.

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

Review of ineffective assistance of counsel on appeal claims is based on the same two-prong deficient performance and prejudice test established in Strickland v. Washington, 466 U.S. 668 (1984). See: Grey v. Greer, 800 F.2d 644 (7th Cir. 1986). "If appellate counsel has failed to raise a significant and obvious issue, the failure should be viewed as deficient performance. If an issue which was not raised may have resulted in a reversal of the conviction or an order for a new trial, the failure was prejudicial." Id. at 646.

Appellate counsel is not required to present all potential issues on appeal if the decision to not present an issue was made out of professional judgement. Tisdale v. State, 594 S.E.2d 166 (2004). However, even if there is evidence that a professional decision was made by appellate counsel, that choice is still subject to scrutiny. Grey, supra, (If appellate counsels choice of issues were not subject to scrutiny, the right to effective assistance of counsel on appeal would be worthless). Applicant contends that the failure to raise an issue lacks an objective standard of reasonableness, if the issue raised is somehow weaker or procedurally barred. Here, the issues that were not raised are clearly stronger than the issue presented on appeal and applicant believes that his conviction would have been reversed had the following issues been raised. For that reason, applicant maintains that prejudice has been shown.

(a) That the trial judge erred in failing to charge the jury with all the elements of the crime, or otherwise intruct 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.

Under Article V, § 21 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 law as is applicable to the issues raised by the evidence, State v. White, 44 S.E.2d 741, 743 (1947) (quoting State v. Durant, 70 S.E. 306, 306-07 (1911)). The failure to object to basic or fundamental flaws in charges does not constitute a waiver because the trial judge was already required to charge the jury on the correct principals of law. State v. Lyles, 41 S.E.2d 625 (1947); State v. McGee, 193 S.E. 303 (1937).

Stating a legal conclusion which would result if the jury found certain facts, is not a charge on the facts. State v. Clamp, 80 S.E.2d 918 (1954). And, generally, it is not error to charge a jury with law defining crime with which the defendant is not charged, if purpose is to enlighten the jury regarding the issues before it. State v. Leonard, 355 S.E.2d 270, 273 (1987).

Issues may be preserved by motion or by objection. State v. Tessnear, 185 S.E.2d 611 (1971). No objection is necessary if earlier in proceeding judge had an opportunity to pass on the issue. State v. Grantt, 272 S.E.2d 169 (1980). If request is made but denied, it is unnecessary to raise request at conclusion of court's instructions. State v. Johnson, 508 S.E.2d 29, 31 (1998). A litigant is not required to persist on a point that has been fully ruled upon by the court. State v. Aldret, 489 S.E.2d 635 (1997). A defendant is not required to engage in futile actions in order to preserve issues for appeal. Staubes v. City of Folly Beach, 529 S.E.2d 543, 547 (2000).

The court must charge the jury with all the elements of the offense. Not only is "knowledge" of the goods stolen character and "possession" of the goods elements that must be proven, but proof that "the goods were received from someone else who stole them" is likewise an element of the offense. See: State v. Hamilton, 174 S.E. 396, 397 (1934); State v. Tindall, 50 S.E.2d 188. 190 (1948); State v. McNeil, 445 S.E.2d 461, 462 (1994); State v. Wiles, 679 S.E.2d 172 FN1 (2009); and The Criminal Law of South Carolina, (4th Ed. 2002), W. McAnich and G. Fairley, at 410 (For a complete list of essential elements for receiving stolen goods, the State must also prove that the goods were stolen by someone else); United States v. Gaudin, 515 U.S. 506, 511, 522-23 (1995)(elements mandated).

In the case sub-judice, the trial judge failed to give an instruction on all of the elements which left the jury to assume that they were authorized to convict applicant even if he were the thief who stole the goods himself.

Here, the State's witness who was one of the lead detectives, testified that applicant could have stolen the camper himself. (Trans. page 331, line 15 - page 332, line 5). This testimony put the trial court in the position of needing to instruct the jury on this additional element of the offense. Without it, the jury was unaware that a distinction existed between receiving stolen goods and larceny, or that they were not permitted to convict applicant if they found he had

stolen the camper himself. The jury was left to assume they were authorized to convict applicant even if he were the thief who stole the camper himself. Without proper instructions, the jury was allowed to convict applicant on an improper basis. It is a fundamental principal that a jury may only convict a defendant if the State has proven every element of the offense. Without instructing the jury on all the elements, the judge made a basic error and it was ineffective assistant of appellate counsel not to have raised this meritorious issue that would have resulted in the reversal of applicants convictions.

(b) That the trial judge erred in refusing to allow Applicant to question States' witness 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.

During the trial, applicant attempted to question States' witness Ben Lindler concerning "conduct" in committing other questionable acts, providing false statements to police initially, and then when caught, that he spun a story that implicates someone else but makes himself out to be the victim. Since Lindler had done this more than once, applicant believed that the jury should have seen evidence of it to demonstrate that Lindler had a habit, scheme or motivation to blame someone else and even though he always plays himself to be the victim, the evidence does not support his story.

For example. Lindler admitted that he burglarized applicants home. He claimed to have done $100.00 worth of work for applicant and admits that he received a $2,000.00 set of wheels for his labor. Nevertheless, he claims he broke into applicants home to take additional property for the rest of what he believed was owed to him. In other words, Ben Lindler claimed he was a good guy who was screwed over on some deal and was simply trying to get what was owed to him because he was a victim. Yet he did not break into applicants home and take $100.00 or less. He took $40,000.00 in property. The jury should have been able to hear all about this because they may have found that Ben's actions do not match his story that he was only trying to get what was owed to him.

Next, Ben took money from Advanced Auto and stole four campers from North Carolina. Again, he tries to play himself as the victim. He initially claimed a Mexican had robbed him and when police caught him in the lie, he changed his story. This time he claimed to be a victim who was

scared and intimidated by applicant who forced him to steal against his will. Yet investigations by both South Carolina and North Carolina detectives found that applicant was in another State at the time and was not involved in any of Ben's illegal activities and the jury could have found that applicant could not have intimidated, threatened or forced Ben to commit those crimes from such a distance. In other words, had the jury been permitted to hear this evidence, they may have recognized Ben's testimony as nothing more than a seasoned criminals attempts to point the finger at someone else to lessen his own culpability. The jury could have found based on that evidence, that Ben was not reliable, truthful and lacked credibility.

The trial judge refused to allow applicant to ask those questions because Lindler had not been arrested or convicted of some offenses and had completed PTI on others. Applicant believes this denied him the opportunity to expose to the jury facts concerning "conduct" which they could have drawn inferences relating to the reliability, truthfulness and credibility of Lindler. State v. Jenkins, 474 S.E.2d 812 (1996); See also: State v. Gunn, 437 S.E.2d 75 (1993)(a witness other than a defendant may be questioned about conduct because only a defendant can be prejudiced by such questioning).

(c) That 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 in order to find guilt.

The State must prove every element of the offense. State v. Barksdale, 428 S.E.2d 498, 501 (1993). In addition to proof of "receiving" or "possession" and "knowledge" of the goods stolen character, the State must also establish venue. State v. Williams, 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).

The State may not prove its case by stacking inferences upon inference, State v. Gunn, 437 S.E.2d 75, 81 (1993), and evidence which raises a mere suspicion of guilt or that requires the jury to

speculate is not sufficient. State v. Ballenger, 470 S.E.2d 851, 853 (1996). 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).

The evidence at trial established that applicant received or possessed the camper in Greenville County - not Spartanburg County - on December 2, 2006, when he brought it to his Grandmothers home. (Trans. pages 205, lines 23 - page 206, line 3). Every witness testified that they did not know when, where or in what County the camper was received. (Trans. pages 209, lines 6-16; pages 330, lines 15 - page 331, line 14). No one ever saw applicant in possession of the camper in Spartanburg County, either at Upstate Sign's (Bill Dotsons' shop) or at applicants home in Inman. (Trans. pages 276, lines 13 - page 278, line 20).

The evidence at trial demonstrated that applicant had traded his "enclosed trailer" to Bill Dotson for the "camper". (Trans. page 226, lines 8-17). The "enclosed trailer" was taken to Bill Dotson's shop in Spartanburg where he attempted to sell it. The "enclosed trailer" had identical racing stickers as those found on the "stolen camper". (Trans. pages 23, lines 13-20; page 63, lines 11-17; and page 307, lines 24 - page 308, line 6). In fact, the "enclosed trailer" and "camper" looked so similar that applicants father failed to initially recognize any distinction. (Trans. page 207, lines 6-22; and page 226, lines 18-25).

Apparently, the judge denied directed verdict because he believed venue had been established by Ben Lindler's testimony that two black men had stolen the camper for him. Even if true, that testimony does not establish that the camper was received or possessed in Spartanburg County. (Trans. page 278, lines 17-20). The denial of directed verdict required the jury to stack inference upon inference and to speculate that the camper recovered in Greenville County was actually "received" in Sparatanburg County when no evidence existed to support that finding. See: Ballenger, supra, at 853.

In connection, it is possible the trial judge may have erred by believing that venue had been established because two officers had looked at a "trailer" at Bill Dotson's shop in Spartanburg and

Dotson had claimed the "trailer" belonged to applicant. This is a misreading of the facts. Applicant had traded his "enclosed trailer" for the "camper". The camper was taken to applicants Grandmothers home on December 2, 2006. The "enclosed trailer" which had identical racing stickers, was taken to Bill Dotson's shop where he attempted to sell it. Since applicant had not paid Dotson the remaining $ 10,000.00 for the camper, the trade was not yet complete. Applicant had agreed to transfer the title to the "enclosed trailer" over to Dotson when he sold his machines and could pay the remaining $ 10,000.00. Since that had not taken place, it is reasonable to assume that Dotson would have still referred to the "enclosed trailer" as belonging to applicant or that Bill could not sell it without applicant releasing the title.

What officers looked at in Spartanburg at Dotson's shop, was not the "stolen camper", but rather, applicants "enclosed trailer". We know this for two reasons. First, the "stolen camper" was in Greenville from December 2, 2006 until its recovery. Officers went to Dotson's shop after that December 2, 2006 date. (Trans. page 299, lines 19-22). Thus, whatever officers looked at in Spartanburg, it would be unreasonable to infer, speculate or assume it was the "stolen camper". In fact, the officers did not identify it as a "camper" with a living area, kitchen, bath, stove, etc... but identified it as an "enclosed trailer", the kind in which you haul go karts and motorcycles. (Trans. page 296, lines 21 - page 297, lines 2 and 16-19). This would be a fair description of applicants "enclosed trailer", but not the "stolen camper".

Simply put, this evidence is too tenuous to permit a reasonable inference that applicant received or possessed the stolen camper in Spartanburg County so as to overcome venue and the directed verdict motion.

Assuming arguendo, that sufficient evidence existed to create a dispute as to whether the camper was received or possessed in Greenville or Spartanburg County, thereby requiring that question to be submitted to the jury; the judge failed to instruct the jury that a relevant dispute existed, or that they needed to first determine whether camper was received or possessed in Greenville or Spartanburg County, and if they find camper was received in County other than Spart-

anburg, they must find applicant not guilty. State v. Henerson, 329 S.E.2d 448, 451 (1985).

Applicant had previously submitted written requests for jury charges that included this charge, but the judge refused to give it. (See: Exhibit "J", attached to Applicants Affidavit). Even if this court finds that a dispute existed warranting the denial of the directed verdict motion, the trial judge nevertheless erred by failing to "declare the law", White, supra; Durant, supra; Clamp, supra; Lyles, supra; and McGee, supra. If a request is made but denied, it is unnecessary to raise the request at conclusion of court's instructions. See: Johnson, supra; Aldret, supra; Staubes, supra; Grantt, supra; and Tessnear, supra.

(d) That trial judge erred in failing to exclude testimony of Detective Beck concerning an investigation and conversation that was related to another case.

At the time of the conversations with Detective Beck, applicant was under arrest for an unrelated offense involving the Advanced Auto Parts theft, (which Lindler later went through PTI) and for the theft of four campers from North Carolina. It should be noted that the conversation and statements made were not inculpatory and dealt with whether applicant had seen the four campers at Bill Dotson's shop in Spartanburg that were stolen from North Carolina.

Applicant admitted that he had seen four campers at Dotson's shop in the past but did not admit to stealing them, possessing them, or having knowledge of where they came from. Applicant 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. The description of the four campers given by Beck did not match the stolen toy hauler camper subject to this case and applicant saw no connection. Beck said they had recovered the four campers, one in Spartanburg and three in North Carolina, so applicant had no reason to believe the camper he had traded Bill Dotson was involved in any theft. Moreover, Beck did not indicate that police believed Dotson was involved in the theft of the four campers seen at his shop. Applicant was left to assume someone else had stolen the campers and brought them to Dotson's sign and graphics shop to have work done to them. It was common to see trailers and campers at Dotson's shop because he was involved in that line of business.

The information given to applicant did not cause him to become suspicious of Bill Dotson or to question whether the camper he was buying from Dotson might also be stolen. Once applicant was booked in jail and was able to gain access to a telephone, he called his father and told him he was in jail for some campers stolen from North Carolina and for a robbery of an Advanced Auto. Applicant told his father that he did not suspect that Dotson was involved in any criminal activities or that the camper he had traded Dotson might also be stolen, but applicant and his father decided that it would be a good idea to have it checked out. (Trans. (B), page 16, line 22 - page 17, line 14 and page 35, line 7 - page 36, line 21). Applicants father began calling around and eventually it was determined that the camper was stolen - not from North Carolina, but from Spartanburg.

Applicant contends that Beck's testimony 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). The State knew full well that the four campers stolen from North Carolina and seen at Dotson's shop were unrelated to the current offense, but they were attempting to mislead the jury by introducing evidence that "other" campers had been seen at Dotson's shop in Spartanburg. They were hoping the jury might be confused by this evidence and "assume" that one of those four campers was the stolen camper subject to this case and therefore it had been seen in Spartanburg at Dotson's shop when in fact it had not.

This unrelated testimony created a false impression in the minds of the jury and allowed the jury to find guilt on an improper basis. It was ineffective assistance of appellate counsel not to raise this issue on appeal.

(e) That Applicant was denied his Sixth Amendment Rights to a Fast and Speedy Trial.

The challenged crime occurred in October, 2006. Applicant filed for a fast and speedy trial soon after his arrest. 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 the delays and continuances in open court and in writing.

Because of the delay, the witnesses who testified repeatedly maintained that they could not remember important dates, facts or events and the stale prosecution made the charges indefensible. (Trans. pages 21, lines 22 - page 22, line 3; page 258, lines 4-8; page 259, lines 17-19; page 262, lines 6-8; page 300, lines 12-17; page 302, lines 11-12 and page 330, lines 7-14).

Unknown to applicant, Hogan Hugh Justice, III, plead guilty to the theft of the camper in 2009. Following this plea, Justice was expedited to North Carolina to face other camper thefts in that jurisdiction. Had applicant been given a trial prior to Justices' expedition, Justice would have been under the courts power to subpoena and could have been forced to testify that he stole the camper. This would have been helpful to the defense because Ben Lindler, one of the State's witnesses, testified that applicant had two black men steal the camper for him. Lindler's testimony was a lie and the fact that Justice admitted to stealing it would have overcome the States only evidence that indicated that applicant had knowledge the camper was stolen.

Secondly, the delay prevented applicant from locating Bill Dotson who had moved away. Applicant maintained that he had bought the camper from Bill Dotson, (Trans. page 316, lines 4 - page 317, line 21), and Justice's testimony could also have established this fact.

The State knew applicant had claimed to have traded his "enclosed trailer" to Dotson for the "camper" and the State caused the delay in order to gain an unfair tactical advantage by separating applicant from his potential witnesses and making them unavailable to the defense.

In connection, it came to light during the trial that another reason for the delay was so that the State's witness, Ben Lindler, could complete PTI and testify for the State without having his credibility attacked when he testified. (Trans. page 279, lines 16-25).

Here, the State cannot meet the four factors used in determining whether the delay was justified and whether applicants rights have been violated. State v. Kennedy, 528 S.E.2d 700, 704 (2000) (quoting Barker v. Wingo, 407 U.S. 514 (1972)).

In Barker, supra, the court noted that four factors should be considered in determining whether a defendant was denied his Sixth Amendment Right to a fast and speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the defendants assertion of his rights; and (4) the prejudice to the defendant.

(1) The length of the delay

"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". Barker, supra, at 530. In Doggett v. United States, 505 U.S. 647, 652 FN1 (1992), the court noted that a one year delay is presumptively prejudicial. Likewise, this State has held that delays over one year are sufficient to raise a presumption of prejudice. State v. Kennedy, 528 S.E.2d 700 (2000)(two year delay sufficient); State v. Waites, 240 S.E.2d 651 (1978) (two plus year delay sufficient); State v. Brazell, 480 S.E.2d 64 (1997)(three plus year delay sufficient).

Here, a four year delay could hardly be said to be insufficient to raise a presumption of prejudice. "Proof of actual prejudice makes a due process claim concrete and ripe for adjudication." United States v. Lovasco, 431 U.S. 783, 789 (1977).

(2) Reasons for the delay

The State has provided no reasons for the delay. They did not claim applicants case was particularly complicated for it was no complex conspiracy charge the State was dealing with, but rather, a run-of-the-mill receiving stolen goods charge that rested on eyewitness testimony alone. Howell v. Barker, 904 F.2d 889 (4th Cir. 1990). At best, the State could only suggest the delay was the result of a crowded docket and even that would be insufficient to excuse the delay. See: Kennedy, supra, at 704.

Applicant maintains the State caused the delay to gain an unfair tactical advantage by causing him to loose two material witnesses; by causing witnesses to be unable to recall important dates and events; and by allowing its Star witness to complete PTI to escape damaging cross-examination.

It goes without saying that improper reasons for delaying a defendant's trial are "weighted heavily against the government". Barker, supra, at 531. Regardless of whether this court believes the delay was intentional or not, even neutral reasons for a delay are subject to scrutiny because "the ultimate responsibility for such circumstances must rest with the government rather than the defendant". Id. Even finding that the government's reason for a delay is valid does not mean that the defendants rights to a speedy trial has not been violated. It is only one of the four factors that "must be considered together". Barker, at 533.

(3) Defendants assertion of his rights

Here, applicant had requested a fast and speedy trial, both verbally and in writing, years prior to his trial. Applicant complained and objected to every continuance and delay and even asked that the charges be dismissed on the morning of his trial. "The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right". Barker, supra, at 531-32. In this case, there can be no question that applicant asserted his rights in a timely fashion.

(4) Prejudice to defense

Prejudice, of course, is the most important factor to be assessed in the light of the interests of a defendant which the speedy trial right was designed to protect. Barker, identified three interests but only one is applicable to this case. Applicant contends that the delay caused his inability to adequately defend himself and thus skewed the fairness of the entire system. Barker noted that if a "witness dies or disappears during a delay, the prejudice is obvious. There is also prejudice if witnesses are unable to recall accurately events of the distant past". Id. at 532.

This is exactly what Applicant alleged happened in this case. First, Bill Dotson disappeared. Applicant claimed to have traded an "enclosed trailer" to Dotson for the "camper". Secondly, Hugh Justice plead guilty to the theft of the same camper but the delay lasted so long, Justice was expedited to North Carolina and was no longer within the courts subpoena power. Thirdly, the delay

allowed Ben Lindler to complete PTI so he could testify for the State without his "conduct" being brought up on cross-examination. This deprived the jury of hearing testimony that might have influenced their view of Lindlers' truthfulness and credibility. Finally, the delay caused witnesses not to be able to recall important dates and events. This was important here, because the exact date officers went to Dotson's shop to look at the trailer was the focus of the jury in deliberations. The jury must have reasoned that if officers went to Dotson's shop "after" December 2, 2006, when the camper had already appeared in Greenville, then officers must have been looking at something other than the stolen camper. Since officer were not certain of the exact date of their trip to Dotson's shop, the jury was left to assume it was before December 2, 2006, when there was no evidence in the record to support that finding.

In the case sub-judice, the delay skewed the fairness of the entire system, because the jury was unable to hear from the thief who stole the camper, who's testimony would have contradicted Ben Lindler's testimony that two black men had stolen the camper for applicant. The jury was unable to hear from the man applicant had actually received the camper from or was unable to witness Mr. Dotsons' attempts at distancing himself from selling the camper to applicant, when Mr. Justice saw him do it. The jury was unable to hear about Lindler's "conduct" and his possible motives for implicating applicant to lessen his own culpability. And, finally, the jury was deprived of accurate testimony concerning dates and events that was necessary in this case to a just and fair verdict.

Under the unique facts of this case, applicant was clearly prejudiced from the four year delay, and it was ineffective assistance of appellate counsel not to have raised this issue on appeal.

(f) That Applicant was denied his Sixth Amendment Right to Counsel because he did not knowingly, intelligently or voluntarily waive his right to counsel.

For several years Applicant had attempted to establish a two-way communication with his court appointed counsel, Andrea Price, but had been unsuccessful. Applicant was being shuffled from Kirkland R & E, which had no access to a law library, to Spartanburg County jail and a North Carolina jail, which had no law libraries. Applicant was unable to conduct research and was wanting to

discuss his possible defenses with Ms. Price. Since applicant could not get Ms. Price's participation, he decided that he should ask to represent himself with the assistance of stand-by counsel. Applicant never asked to "relieve counsel". Applicant believed that the court would either appoint new counsel to assist him or would instruct Ms. Price that now she had to assist applicant with his pretrial preparations.

Judge Couch did not inform Applicant that one of the dangers of self-representation might be that he could be forced to represent himself without any stand-by counsel. Had applicant been so instructed, he would not have represented himself. Instead, Judge Couch ordered Ms. Price to help applicant in pretrial preparations by conducting research on applicants behalf and reporting that back to applicant. (Appendix Exhibit "A").

Ms. Price was angered by this and went behind Judge Couch and applicants back and had another judge tell her she did not have to assist in pretrial preparations but could simply "set-by" applicant during the trial to answer questions. Applicant filed objections (See: Exhibit "B" of Applicants affidavit), and repeated requests that someone be appointed to assist him in legal research. These repeated requests and objections should have put the court on notice that applicant did not knowingly, intelligently and voluntarily waive his right to counsel.

During the trial, Ms. Price refused to assist applicant and on several occassions behind applicant's back, but in front of the jury, Ms. Price acted in such a way that would have given the jury the impression that even counsel at the defense table did not believe in applicants innocence. (See: Exhibit "C" of Applicants Affidavit). Had applicant known this was taking place behind his back, he would have objected. It could not have been a professional decision not to raise this issue on appeal, because counsel did not even obtain or review the transcripts of the motion hearing to determine whether applicant was adequately warned that he could be forced to stand trial without "any" legal research resources.

Applicants understanding of the law was that he was entitled to stand-by counsel, even if he represented himself. State v. Sanders, 237 S.E.2d 53 (1977); State v. Brewer, 492 S.E.2d 97 (1997). Applicant believed this practice existed to protect his due process rights which require the court

to provide him with access to legal research resources necessary to prepare for his defense. See: Milton v. Morris, 767 F.2d 1443, 1445-47 (1985). As applicant understood it, one such method of providing such access was through stand-by counsel who could conduct legal research and report it back to the defendant. Love v. Summit County, 776 F.2d 908, 912-13 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986); United States v. West, 557 F.3d 151 (1997)(stand-by counsel can be appointed to conduct research on the defendants behalf and report that information back to the defendant).

The waiver of the right to counsel must be knowingly, intelligently and voluntarily made. State v. Brown, 347 S.E.2d 882 (1986). The ultimate test however of whether a defendant made a knowing and intelligent waiver of the right to counsel, is not the trial judges' advice, but rather the defendants understanding. Graves v. State, 422 S.E.2d 125 (1992). Here, judge Couch did not give applicant any advice or warnings that he could be forced to stand trial without access to any legal research resource including stand-by counsel. The only understanding applicant could have had would have come from his understanding gleamed from the above case law which lead applicant to believe he had a right to stand-by counsel and resources necessary to prepare his defense.

Had counsel assisted applicant in pretrial preparations, she may have been able to get the State to schedule applicants trial sooner so he was not denied a fast and speedy trial. She may have been able to locate Bill Dotson so that he could have been subpoenaed to testify that he had sold applicant the camper. She may have been able to get Hugh Justice subpoenaed from Out-of-State or forced the State to conduct the trial before Justice was expedited out of this courts subpoena jurisdiction. She might have interviewed Justice and discovered that he had plead guilty to the theft of the camper, and not the theft of an RV as the Solicitors Office had lead applicant to believe, which would have bolstered applicants defense and demonstrated that Ben Lindler was lying when he said two black men stole the camper for applicant. Applicants case and ability to defend himself was hindered by Ms. Price's recalcitrant behavior.

Nevertheless, in this case, while the record reflects that applicant knew he had a right to counsel - and even knew he had a 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 in preparation for trial. See: e.g. State v. Gardner, 570 S.E.2d 184, 187 (2002). The record clearly indicates that applicant choose to proceed pro se only if he were provided with stand-by counsel to assist him in preparing for trial. Applicants 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.

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

Based on the same facts and circumstances as shown in Section I(f) above, applicant is aware that this court may find that the question of whether applicant knowingly and intelligently waived his right to counsel would have been inappropriate for direct appeal or that counsel was not ineffective in failing to raise that issue on appeal.

If that is the case, applicant maintains that he is still entitled to relief under a standard Sixth Amendment Constitutional violation that may be raised in a PCR. Finklea v. State, 255 S.E.2d 447, 447-48 (1979)(any violation of a State or Constitutional right may be raised in a PCR). The applicant believes that a PCR action is uniquely appropriate for resolving this issue because the courts inquiry requires additional testimony, affidavits or evidence not found in the previous transcripts. (i.e. applicants testimony or affidavit concerning the warnings given to him and his understanding of what would happen). The United States Supreme Court has previously held that similar issues are not appropriate for direct appeal. DeMarco v. United States, 415 U.S. 449-50 (1974)(question of whether prosecutor knew witnesses testimony was perjury requires additional testimony not found in the record). For the same reasons, ineffective assistance of counsel must be raised in a PCR. State v. Korahrens, 350 S.E.2d 180 (1986), because the claim may involve additional testimony concerning statements or advice of counsel that was given off the record.

Therefore, applicant believes it is appropriate to grant relief to him as a standard PCR issue challenging a denial of his Sixth Amendment Right to Counsel, because this issue requires the consideration of his affidavit or testimony that did not appear in the record on appeal.

III. APPLICANT WAS DENIED HIS FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW BY NOT BEING PROVIDED WITH THE RESOURCES NECESSARY TO CONDUCT PRETRIAL LEGAL RESEARCH OR TRIAL PREPARATIONS.

In addition to the claims set forth in Sections I(f) and II above, applicant maintains that those same facts and circumstances establish that he was denied his due process rights under the Fourteenth Amendment. The applicant maintains that the court was required to provide him with access to resources necessary for the preparation of his defense. Milton v. Morris, 767 F.2d 1443, 1445-47 (1985). That stand-by counsel would have been an acceptable method of conducting the research and trial preparations, Love, supra, but the court deprived applicant of that and any other method in violation of his due process rights. The fact that the court ordered Ms. Price to assist applicant "during" the trial to answer questions, did not correct this flaw. This assistance was too little and came too late to be of any help to applicant in preparing for trial. The lack of access to controlling case law prevented applicant from presenting some of these issues and legal authorities to the trial judge during the trial that might have resulted in a more favorable ruling.

The lack of access to legal authorities, caused applicant to be denied a fast and speedy trial. It caused applicant not to know all the element of the offense and therefore prevented him from bringing the flawed jury instructions to the attention of the trial judge. It caused applicant to be unable to discover case law to quote to the trial judge that applicant should be allowed to cross-examine Ben Lindler concerning his "conduct". It caused applicant to be unable to discover case law to quote to the trial judge that it is inappropriate to allow the testimony of Detective Beck concerning statements made about an unrelated matter. The lack of stand-by counsel as a pretrial research resource, prevented applicant from locating witnesses or having them subpoenaed before they left the courts jurisdiction and cummulatively, it deprived applicant of a fair opportunity to defend himself against the States accusations.

IV. 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.

The jury has the right to determine the truthfulness and credibility of witnesses. United States v. Agurs, 427 U.S. 97, 103 (1976). The State is required to disclose any evidence that is material to the accused's guilt or innocence or is impeaching. Kyles v. Whitley, 514 U.S. 419 (1995). This duty exists whether or not the defendant requests the evidence. This includes any deals made with witnesses for leniency or things of value in one's own prosecution in exchange for the witnesses testimony against the accused. Giglio v. United States, 405 U.S. 150 (1972). It is well recognized that "leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case". United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980); Washington v. Texas, 388 U.S. 14, 22-23 (1967).

For this reason the jury has the right to know about and consider any benefits a witness may receive that could indicate the witnesses true motivation for testifying. This is so because "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendants' life or liberty may depend". Napue v. Illinois, 360 U.S. 264, 269 (1959). When a witness lies about leniency given to him in exchange for his testimony, or when it goes uncorrected by the prosecution, it allows a false impression to be created of the witnesses truthfulness and credibility when the truth would have directly impunged the veracity of the States key witness. Cambell v. Reed, 594 F.2d 4, 8 (4th Cir. 1979).

Likewise, the prosecution has a continuing duty to discover and disclose favorable evidence - such as deals made with "police" for lehiency, Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964), or deals made with "prior prosecutors" not to prosecute a witness in exchange for his testimony before a grand jury or during a trial. Giglio, supra.

The fact that the prosecutor does not solicit the false testimony concerning deals or other false testimony concerning material facts of a case is irrelevant. The same result occurs simply by allowing it to go uncorrected when it appears. Napue, supra, at 269. Likewise, it is insufficient for the prosecutor to claim that he did not "know" the testimony was false because its falsity would

have only been known to police or prior prosecutors. It is enough if the prosecutor "should have known" the testimony was false. United States v. Kelly, 35 F.3d 929, 935 (4th Cir. 1994)(citing DeMarco v. United States, 415 U.S. 449, 449-50 (1974)(should have known)); Agurs, supra, at 103 (when "undisclosed evidence demonstrates that the prosecution knew, or should have known of the perjury, the standard for materiality is whether there is any reasonable liklihood that the false testimony could have affected the judgment of the jury"). Here, the prosecution "should have known" about the false testimony because he could have learned about the deals and other false testimony had he spoken with police and the previous prosecutor, Bryan P. Kelley.

In the case sub-judice, the States witness Ben Lindler was a co-worker of applicants and was friends with Hogan Hugh Justice, III and Bill Dotson. Ben Lindler broke into applicants home and stole thousands of dollars worth of property. While taking the police report, applicant told detectives that Ben Lindler should be considered the main suspect. A few days later applicant confronted Ben Lindler and was able to get his property back. Applicant was so angry at Lindler that he refused to let Lindler back on his property. Lindler dropped the property he had stolen off at Bill Dotson's shop.

At this same time, Ben Lindler, Hugh Justice and Bill Dotson had stolen four (4) campers from North Carolina. Ben Lindler had also stolen money from Advanced Auto where he worked part time. Ben Lindler initially told police that a Mexican had robbed him. When his story did not pan out and he realized that he was caught, he apparently saw an opportunity to get back at applicant. He spun a story which left his friend Bill Dotson out but implicated applicant and Justice in several crimes.

Justice was arrested for the theft of the camper from Holiday Kamper and applicant was arrested for both a larceny of an RV and and for receiving the stolen camper. The larceny charge was later dropped against applicant. (See: Exhibits "F", pages (1) and (2), attached to Applicants Affidavit). The previous prosecutor, Bryan P. Kelley falsely informed applicant that Justice had plead guilty to the theft of the RV when in fact he had plead guilty to the theft of the camper.

Apparently, Lindler believed that he could utilize his position to gain favorable treatment by suggesting that he could be a State witness against applicant and Justice. Lindler made a deal with police and his previous prosecutor to testify against applicant and in exchange they would not arrest or prosecute him for the 1st degree burglary of applicants home and they would talk to North Carolina Detectives about not arresting or prosecuting Lindler in their jurisdiction, if he would testify against applicant and Justice in the North Carolina trials. Lindler was then allowed to go through PTI on the remaining Advanced Auto theft. This benefited the prosecution greatly, because when Lindler took the stand, he would have no prior arrests or convictions that could be used to demonstrate his lack of truthfulness and credibility.

During the trial Lindler admitted that he burglarized applicants home, stole campers from North Carolina and took money from Advanced Auto. When applicant questioned Lindler as to what ever happened to those crimes, Lindler responded:

> A. "No, I've had no deals, no pats on the backs, no easy rides, nothing". (Trans. page 287, lines 8-11).

This was untrue because Lindler received things of value such as not being arrested or prosecuted for some offenses and by being allowed to go through PTI on others. When applicant attempted to learn more about what happened to the crimes he admitted committing and implied that perhaps receiving PTI might be considered "an easy ride" that would motivate him to testify untruthfully, the court prevented such examination because it felt evidence of the PTI was impermissible. The prosecutor should have known Lindlers' testimony was false and should not have allowed it to go uncorrected. It created a false impression of Lindler's motivation to testify. See: United States v. Singleton, 144 F.3d 1343, 1350 (1998)(a promise not to prosecute has an even greater value; besides guaranteed physical freedom one has guaranteed freedom from the burden of defending himself and from the stigma of prosecution and conviction as well); United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987)(It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence), cert. denied, 484 U.S. 1026 (1988).

Even more importantly, the prosecutor allowed Lindler's testimony to go uncorrected when Lindler

testified falsely concerning a material fact of the case. Lindler testified that applicant had two black men "steal the camper for" applicant. (Trans. page 254, line 19-page 255, line 1). This is a material fact that goes to two elements of the offense. First, the State must prove the defendant has "knowledge" the goods are stolen. Hicks v. State, 443 S.E.2d 907 (1994). The States position would be that if applicant had someone else steal the camper for him, he certainly would have known it was stolen.

Secondly, the State must prove the element that the goods "were received from someone else who stole them". Tindall, supra; McNeil, supra; and Wiles, supra. Here, the States position would be that if two black men stole the camper for applicant, he must necessarily have received it from someone else who stole it.

The problem is this testimony was false and the prosecution knew it, and allowed it to go uncorrected. Just prior to applicants trial, Hugh Justice had plead guilty to the theft of the camper from Holiday Kamper. The prosecution knew it had not been stolen by two men for applicant as Lindler testified, but in fact had been stolen by Justice, Lindler and Bill Dotson.

The prosecution allowed this known false testimony to go uncorrected because it helped them prove two of the elements of the offense and had they corrected it, the State would not have any remaining evidence with which to establish that applicant had "knowledge" the camper was stolen or that it had been "received from someone else who stole it".

This failure to correct false evidence created a false impression of the evidence against applicant concerning material elements of the crime. Nevertheless, the good faith or bad faith of the prosecution is not important. Brady v. Maryland, 373 U.S. 83, 87 (1963). The deliberate deception of a court and jurors by the presentation of known false evidence cannot be reconciled with the rudimentary demands of justice. Riddle v. Ozmint, 631 S.E.2d 70, 75 (2006). When a Brady violation is established, reversal is required. State v. Kennerly, 503 S.E.2d 214, 220 (1998).

V. EVIDENCE 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 STATES WITNESS.

Based upon the same facts as set forth in Section IV above, in the event that this court finds that the prosecutor did not know of the false testimony or could not have known, applicant maintains that he is still entitled to relief in his favor on this evidence that has not previously been presented, which requires the reversal of the conviction in the interest of justice. A conviction based on false evidence cannot stand. Washington v. State, 478 S.E.2d 833 (1996); Riddle v. Ozmint, 631 S.E.2d 70 (2006); United States v. Agurs, 427 U.S. 97 (1976).

WHEREFORE, Premises considered, applicant prays that this Honorable court grant him summary judgment, in full or in part, on one or more of the above grounds, as a matter of law and order his immediate release from custody.

Respectfully submitted,

September 25, 20015

s/James Douglas Tinsley

James Tinsley, #171943
Trenton C.I. 3-C-18
84 Greenhouse Road
Trenton, S.C. 29847

CERTIFICATE OF SERVICE

I, James Douglas Tinsley, Sr., hereby certify that I did cause the foegoing Motion for Summary Judgment on the behalf of the Applicant, to be served upon all counsel of record, this 9 day of NOVEMBER, 2015, by placing a true and correct copy in the U.S. mail, with proper postage affixed thereto and addressed as follows:

SUZANNE WHITE, Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211

LEAH B. MOODY
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s/James Douglas Tinsley Sr.
James Douglas Tinsley, Sr.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

CASE No: 2014-CP-42-0384

JAMES TINSLEY, II,
Applicant,
vs.
STATE OF SOUTH CAROLINA,
Respondent.

APPLICANTS MOTION TO Alter OR Amend

COMES NOW, Applicant with his Motion to Alter OR Amend this COURTS previous ORDER OF dismissal, Filed September 12, 2016, which misconstrued Applicants claims and Failed to consider the material Facts OF the case.

I. WAIVER OF RIGHT TO COUNSEL

This COURT MISCONSTRUED Applicants claim by suggesting that Applicant Repeatedly Requested to Represent himself and therefore the waiver OF Counsel was valid. There is no question Applicant wanted to represent himself. The issue is whether

Applicant understood that IF he did so, he would do so without any FORM OF stand-by COUNSEL OR other legal Research Resources. Applicant contends he did not Knowingly and intelligently waive COUNSEL because he did not realize that consequence, Applicant Relied and had a detrimental belief that he would be provided with stand-by COUNSEL OR other Research Resource based upon PRIOR South CAROLINA Supreme COURT CASELAW which provides the Right to stand-by COUNSEL "even IF A defendant Represents himself. STATE v. Sanders, 237 S.E.2d 53 (1977).

Therefore, IF Applicant did not understand that he would not be provided with any research aid, his waiver could not have been intelligently given. The Fact that Applicant was able to Make Motions and some arguments based on his Memory, does not mean that he could not have done an even better JOB OF perfecting his defense had he had adequate Resources.

This COURT has failed to address this point and there are no Facts in dispute with regard to this claim. The State has not disputed any OF applicants Facts. IF no Fact is in dispute Applicant is entitled to Relief. IF a Fact was in dispute, IT would be improper to grant the State Relief.

II. LACK OF RESOURCES DENIED DUE PROCESS

This courts order failed to address this issue. Applicant likewise contends that the refusal to provide pretrial stand-by counsel, access to a law library or some other type research aid denied him due process of law. Milton v. Morris, 767 F.2d 1443, 1445-47 (1985)

Again, the fact that Applicant was able to make some limited legal arguments does not negate this issue nor suggest that Applicant could not have done a better job of perfecting his defense had he had access to research resources. The State has not provided any evidence to dispute this facts.

III. Denial of FAST AND SPEEDY TRIAL

Applicant endured a delay of four years in going to trial. This court found that the State was entitled to the delay in order to prepare its case and Applicant has not demonstrated any prejudice. First, there is no evidence to support these findings. The State offered no evidence that the delay was necessary to prepare its case.

Secondly, Applicant was charged with Receiving a stolen camper. Applicant claimed that he had traded/bought the camper FROM Bill Dotson and had no knowledge that the camper was stolen. During the delay, Bill Dotson moved away and could no longer be located. The inability to call Mr. Dotson to testify FOR the defense clearly prejudiced Applicant because his testimony would have went to the heart OF Applicants position. BARKER V. Wingo, 407 U.S. 514, 532 (1972) (IF a witness dies or disappears during a delay, the prejudice is obvious)

IV TRIAL error in Failing to instruct the jury on venue

This COURT Found that Applicant had Failed to PRESERVE this ISSUE FOR direct Appeal and that the issue could not be Raised in a PCR. These Findings are not supported by the Record. Applicant is well aware that this is a direct appeal issue. Applicant Raised it in conjunction with his claim OF ineffective assistance OF Appellate counsel FOR Failing to Raise IT on direct appeal.

Applicant was charged with receiving a stolen Camper in Spartanburg County that was recovered in Greenville County. Applicant did make several motions as to venue, including directed verdict and a request to charge the jury that IF they find the camper was only possessed in Greenville County, that they MUST find Applicant not guilty. This request was denied and constitutes reversible error. State v. Henderson, 329 S.E.2d 448, 451 (1985) (what County a crime occurs in is a question of fact for the jury); Carazos v. Smith, 132 S.Ct. 2, 4 (2011).

Clearly this issue was preserved for Appeal and it was ineffective assistance of Appellate counsel not to have raised this issue for review. The jury was the fact finders and they had a right to determine in what County the camper was possessed. Without this instruction, the jury was left to assume Applicant could be convicted in Spartanburg County for a camper possessed only in Greenville County.

V. Ineffective Assistance of Appellate Counsel

As shown above, there were meritorious issues that were stronger than the issue raised by counsel,

that should have been raised on direct Appeal. The failure to do so was ineffective assistance of Counsel and Applicant was prejudiced by that failure because Applicants conviction would have been overturned had those issues been raised. It is Reversible error to fail to give a charge that is supported by the evidence, goes to the defenses case or clarifies an issue being considered by the jury. State v. Hill, 433 S.E.2d 848, 849 (1993); State v. Santiago, 634 S.E.2d 23, 26 (2006); State v. Day, 535 S.E.2d 431, 435 (2000)(Charges must Reflect theories of defense); State v. Clamp, 80 S.E.2d 918, 922 (1954)(charges must inform the jury of any legal conclusions which will result if the jury finds certain facts); United States v. Lewis, 592 F.2d 1282 (1979)(jury must be instructed that if certain Facts are believed by the jury it would be legally sufficient to Render the accused innocent).

WHEREFORE, Applicant prays that this court will Reconsider its previous order of dismissal in light of these undisputed Facts and supporting case law and Grant applicant Relief in his Favor.

Respectfully submitted

September 17, 2016 s/ James D. Tinsley

James Tinsley
1004 S. Welcome Road
Greenville, S.C. 29611

Certificate of Service

I, James Tinsley, hereby certify that I did cause this Motion to be served upon counsel of Record this 19th day of September, 2016, by Placing a true and correct copy in the U.S. mail, with proper postage affixed thereto, and addressed as follows;

Alicia A. Olive
OFFICE OF Attorney General
P.O. Box 11549
Columbia, S.C. 29211

2016 SEP 22 AM 8:48

s/ James Tinsley

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