

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

William H. Seals, Circuit Court Judge

KENNETH JORDAN BELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002457

APPENDIX

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BY THE COURT

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1 see.

2 MS. LIVESAY: I'm sorry about that.

3 JUROR 256: There's no way you can ---

4 THE COURT: I believe we placed it on full screen; is
5 that right; is it as big as it can be?

6 MS. LIVESAY: Yes, sir.

7 THE COURT: That's as big as we can show it.

8 JUROR 256: Can you go a little more forward, just a
9 little bit.

10 MS. LIVESAY: You want it back?

11 JUROR 256: No, forward till they get to the car, as they
12 approach the car.

13 MS. LIVESAY: Okay.

14 THE COURT: And I am told that if we turn all the lights
15 off, you might be able to see it more clearly. Turn all the
16 lights off.

17 JUROR 256: Can you back it just a hair?

18 Can you back it just a little bit?

19 BAILIFF: Judge, they want to know if they can walk up
20 and look at it closer?

21 THE COURT: Yes. Anyone who wants a closer view can step
22 up; just don't communicate with any of the parties or the
23 attorneys.

24 MS. LIVESAY: You want me to hit play?

25 JUROR 256: Just, yeah, just a little bit more.

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BY THE COURT

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1 MS. LIVESAY: Hit play and then pause?

2 JUROR 256: Yeah.

3 MS. LIVESAY: Play?

4 JUROR 256: Just a little ---

5 MS. LIVESAY: Right there?

6 THE COURT: Is there anything else that you'd like?

7 JUROR 256: Just a little more.

8 THE COURT: All right. Play it on. Play it further.

9 JUROR 256: Can you pause it?

10 MS. LIVESAY: Right there?

11 THE COURT: Does that answer your inquiry?

12 JUROR 256: Yeah.

13 THE COURT: All right. You may retire to the jury room
14 to continue your deliberations.

15 (REPORTER'S NOTE: The Jury exits courtroom. 10:31 A.M.)

16 THE COURT: Any objections from the State to the Court's
17 response to the inquiries?

18 MS. LIVESAY: No, sir, Your Honor.

19 THE COURT: Any from the Defense?

20 MR. MCCOLLUM: There are no objections from the Defense,
21 Your Honor.

22 THE COURT: All right. We'll be in recess then until
23 such time as a verdict is reached.

24 I'm gonna take a short recess in both cases at this point
25 in time and step off the bench. Thank you.

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BY THE COURT

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1 (RECESS - 10:32 A.M.)

2 *****OFF THE RECORD*****

3 (On the Record - 11:14 A.M.)

4 (REPORTER'S NOTE: Jury enters courtroom. 11:15 A.M.)

5 COURT'S EXHIBIT NUMBER TEN

6 MARKED FOR IDENTIFICATION

7 THE COURT: The record will reflect the Jury has returned
8 to the courtroom and ladies and gentlemen, I've received what
9 has now been marked as Court's Exhibit Number Ten. The
10 inquiry that says, What happens if we deadlock on one charge?

11 ALLEN CHARGE BY THE COURT:

12 Now, ladies and gentlemen, you've stated to me that
13 you've been unable to reach a verdict as to one of the charges
14 in this case and as I instructed you earlier, a verdict in any
15 of the charges must be unanimous. I'll tell you that when a
16 matter is in dispute, it isn't always easy for even two people
17 to agree. So when twelve people must agree, it becomes even
18 more difficult to reach agreements. In most cases, absolute
19 certainty cannot be reached or even expected. However, you
20 have a duty to make every reasonable effort to reach a
21 unanimous verdict. In doing this, you should consult with one
22 another, express your own views and listen to the opinions and
23 views of your fellow jurors. Tell each other how you feel and
24 why you feel that way. Discuss the differences you have with
25 open minds. Although the verdict of the Jury must be

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BY THE COURT

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1 unanimous, every one of you has a right to follow your own
2 opinion. The verdict you agree to must be your own verdict in
3 the final analysis. The result of your own convictions and
4 you should not give up your firmly held beliefs merely to be
5 in agreement with your fellow jurors. I would ask that the
6 majority should consider the minority's position. I would
7 also ask the minority to consider and reflect upon the
8 majority's opinion or position. You should carefully consider
9 and respect the opinions of each other and re-evaluate your
10 position for reasonableness, correctness and impartiality.
11 You should lay aside all outside matters and re-examine the
12 questions before you based upon the law and the evidence
13 presented in this case.

14 If you do not agree on a verdict in this case, on one of
15 the charges in that case, it would be my duty to declare what
16 is referred to as a mistrial. In that case, it does not mean
17 that anybody wins; it just means that at some future time
18 either I or some other judge will try this case with some
19 other jury sitting where you now sit. The same participants
20 will come, perhaps the same lawyers will ask basically the
21 same questions and get basically the same answers and we will
22 then go through this whole process again.

23 Now, you were selected in the same manner and from the
24 same source as any future jury in this case would be chosen
25 and there's no reason for me to believe or suppose that the

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BY THE COURT

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1 case will ever be submitted to twelve more intelligent or
2 impartial or conscientious or competent jurors than you, or
3 that any more clearer evidence will be produced by one side or
4 the other. So, what I'm going to ask you to do is to return
5 to your deliberations. Consider what I've just said to you
6 and again re-examine the positions in light of my charge in
7 this matter. So, I'm gonna ask you to return to the jury room
8 and continue your deliberations. Thank you very much.

9 (REPORTER'S NOTE: The Jury exits courtroom. 11:22 A.M.)

10 THE COURT: Any objections from the State?

11 MS. LIVESAY: No, sir, Your Honor.

12 THE COURT: Any from the Defense?

13 MR. MCCOLLUM: One point comes to mind, Your Honor.

14 THE COURT: Yes, sir.

15 MR. MCCOLLUM: Mr. Bell, is subject to multiple
16 indictments. If the Jury reaches verdicts, whether they be
17 guilty or not guilty, on all those indictments with the
18 exception of the one they seem to be referring to, could the
19 Defendant be tried again?

20 THE COURT: I haven't gone there and that's not really
21 before me to decide.

22 MR. MCCOLLUM: Well, it just comes to mind in terms of
23 the Allen Charge because -- and I understand the Allen Charge
24 is well-grounded as the appropriate response, but I just raise
25 that.

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BY THE COURT

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1 THE COURT: I haven't researched it. I would think since
2 each indictment stands on its own and charges and separate and
3 distinct offense with different elements, I would not think
4 that double jeopardy would apply if the Jury deadlocked and
5 mistrial was declared. But I would research that; I don't
6 know.

7 MR. MCCOLLUM: So, that's all I'm raising.

8 THE COURT: All right. It would seem to me -- now, if
9 you have some law as to that, I'll be glad to take a look at
10 it.

11 MR. MCCOLLUM: Well, it just occurred to me.

12 THE COURT: Again, I would think that since each
13 indictment, and we charged them at the beginning of the
14 charge, that they should decide each indictment separately and
15 distinct from the decision that they make in every other
16 indictment. That was the charge they were given at the
17 beginning of their deliberations. So, they are to weigh each
18 offense separately and the fact that they find someone guilty
19 on one charge should not influence their decision in deciding
20 the other charges.

21 MR. MCCOLLUM: Maybe it's more of a practical
22 consideration.

23 THE COURT: So, it would seem to me that since each one
24 alleges separate and distinct offenses with different
25 elements, then I think they each stand alone; that's the way I

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VERDICT OF THE JURY

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1 understand it.

2 MR. MCCOLLUM: All right. Okay.

3 (RECESS - 11:22 A.M.)

4 *****OFF THE RECORD*****

5 (On the Record - 2:50 P.M.)

6 THE COURT: All right. I've been informed by the Bailiff
7 that a verdict has been reached. Is the State ready to
8 receive the verdict?

9 MS. LIVESAY: Yes, sir.

10 THE COURT: Defense ready?

11 MR. MCCOLLUM: Defense is ready, Your Honor.

12 THE COURT: Ask the Bailiff to bring the Jury in.

13 (REPORTER'S NOTE: The Jury enters courtroom. 2:52 P.M.)

14 VERDICT OF THE JURY:

15 THE COURT: All right. Madame Forelady, I've been
16 informed by the Bailiff that a verdict has been reached on all
17 counts; is that correct?

18 JUROR 256: Yes, sir.

19 THE COURT: If you would pass the form to the Bailiff
20 please. Thank you, ma'am.

21 Madame Clerk, you may publish the verdict.

22 CLERK: State of South Carolina, County of Horry, versus
23 Kenneth Jordan Bell, We, the Jury, unanimously find the
24 Defendant, Kenneth Jordan Bell, concerning the offense of
25 burglary first degree, Indictment Number 2013-GS-26-1335,

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VERDICT OF THE JURY

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1 guilty.

2 We, the Jury, unanimously find the Defendant, Kenneth
3 Jordan Bell, concerning the offense of kidnapping, Indictment
4 Number 2013-GS-26-1336, guilty.

5 We, the Jury, unanimously find the Defendant, Kenneth
6 Jordan Bell, concerning the offense of possession of a weapon
7 during a violent crime, Indictment Number 2013-GS-26-1337,
8 guilty.

9 We, the Jury, unanimously find the Defendant, Kenneth
10 Jordan Bell, concerning the offense of armed robbery,
11 Indictment Number 2013-GS-26-1339, guilty.

12 We, the Jury, unanimously find the Defendant, Kenneth
13 Jordan Bell, concerning the offense of criminal conspiracy,
14 Indictment Number 2013-GS-26-1340, guilty.

15 Signed by Foreperson, Michele Ramont, dated August 15th,
16 2013.

17 Ladies and gentlemen of the Jury, if this is your
18 verdict, so signify by raising your right hand.

19 (REPORTER'S NOTE: All Jury members raise right hand.)

20 THE COURT: Thank you. Anything further from the State
21 before I release the Jury?

22 MS. LIVESAY: No, sir, Your Honor.

23 THE COURT: Anything further from the Defense?

24 MR. MCCOLLUM: Not from the Defense, Your Honor.

25 THE COURT: All right. Ladies and gentlemen of the Jury,

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VERDICT OF THE JURY

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1 this completes your service in this case. I want to thank you
2 very much for your attention to your duties in this matter. I
3 have told you throughout the trial that you should not discuss
4 the case with anyone. I will advise you that you now have the
5 right to do so. You also have the right not to do so. Should
6 anyone in any way try to bother you or harass you concerning
7 your service on this jury panel, please report that to the
8 Clerk's Office or the police. Appropriate action would be
9 taken should that occur.

10 I'm not intending to start another trial this week. I'm
11 in the process of trying a case. Is the Jury needed any
12 further or are they released?

13 CLERK: No, sir, they can be released.

14 THE COURT: Okay. We're releasing you from any further
15 service in the matter. So, the Bailiff will take you back to
16 the jury room. They will see that you're processed out. If
17 you need an excuse for your work, I'm sure the Clerk will
18 provide you an excuse for missing the work and I'm sure
19 they'll make arrangements for you to receive your pay for jury
20 services. Thank you very much for your attention to your
21 duties.

22 Now, ma'am, you're the Forelady. We're gonna need to get
23 you to sign some documents on the indictments with the Clerk.
24 You want her to step over here and bring the indictments?

25 CLERK: Yes, sir.

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POLLING OF THE JURY

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1 THE COURT: All right. I think the indictments may be
2 back in the jury room. So, ma'am ---

3 MR. MCCOLLUM: Your Honor, I'm sorry to interrupt, but
4 when you finish, before they're released, may I approach?

5 THE COURT: Yes, sir. Please do now.

6 (REPORTER'S NOTE: A bench conference was held off the record
7 in the presence of the Jury but out of hearing of the Jury.)

8 THE COURT: All right. I have received a request that
9 the Jury be polled. What that means is that the Clerk is
10 going to call your name individually. When you stand, she'll
11 be asking the question if the verdict is still your verdict
12 and you will need to answer that question as she asks it. So
13 I'm gonna ask that the Jury -- Jury be polled and that'll be,
14 my understanding is the request as to all verdicts; is that
15 correct?

16 MR. MCCOLLUM: Yes, as to all.

17 THE COURT: As a group?

18 MR. MCCOLLUM: Yes, without doing each individual charge.

19 THE COURT: All right. I'll ask the Clerk to please poll
20 the Jury.

21 POLLING OF THE JURY:

22 CLERK: When I call your number, if you will please
23 stand. Juror Number 312. Is this your verdict as to all
24 charges?

25 THE COURT: You have to answer verbally, ma'am.

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POLLING OF THE JURY

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1 JUROR 312: Yes.

2 THE COURT: Thank you. You can be seated.

3 CLERK: 319. Is this your verdict as to all charges?

4 JUROR 319: Yes.

5 CLERK: Thank you.

6 256, is this your verdict as to all charges?

7 JUROR 256: Yes.

8 CLERK: Thank you.

9 266, is this your verdict as to all charges?

10 JUROR 266: Yes.

11 CLERK: Thank you.

12 175, is this your verdict as to all charges?

13 JUROR 175: Yes.

14 CLERK: Thank you.

15 84, is this your verdict as to all charges?

16 JUROR 84: Yes.

17 CLERK: Thank you.

18 162, is this your verdict as to all charges?

19 JUROR 162: Yes.

20 CLERK: Thank you.

21 207, is this your verdict as to all charges?

22 JUROR 207: Yes.

23 CLERK: Thank you.

24 289, is this your verdict as to all charges?

25 JUROR 289: Yes.

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POLLING OF THE JURY

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1 CLERK: Thank you.

2 254, is this your verdict as to all charges?

3 JUROR 254: Yes.

4 CLERK: Thank you.

5 51, is this your verdict as to all charges?

6 JUROR 51: Yes.

7 CLERK: Thank you.

8 115, is this your verdict as to all charges?

9 JUROR 115: Yes.

10 CLERK: Thank you.

11 THE COURT: Does that complete the poll?

12 CLERK: Yes, sir.

13 THE COURT: All right. Anything further before I release
14 the Jury?

15 MR. MCCOLLUM: No, Your Honor.

16 THE COURT: All right. Thank you.

17 All right. Ladies and gentlemen, as I said, the Bailiff
18 will take you back and will process you out.

19 Ma'am, you'll need to see the Clerk before you leave to
20 sign the indictments for us.

21 Again, I want to thank you very much for your service in
22 the jury pool this week and at this time, you are free to go.
23 The Bailiff will instruct you if you would like to attend
24 sentencing in the case -- you have the right to do so, you're
25 not required to do so. That would be your choice.

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MOTIONS

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1 You may take the Jury to the jury room. And, ma'am, if
2 you'll just step right over here beside the Clerk.

3 (REPORTER'S NOTE: The Jury exits courtroom and is released.
4 2:59 P.M.)

5 THE COURT: All right, Mr. Bell, if you'd please stand.

6 MR. MCCOLLUM: Your Honor?

7 THE COURT: Yes, sir.

8 MR. MCCOLLUM: I think I need to make some motions.

9 THE COURT: Please do.

10 MR. MCCOLLUM: Is that all right?

11 THE COURT: Yes, sir. You can be seated.

12 MOTIONS:

13 MR. MCCOLLUM: Your Honor, at this time, on behalf of
14 Kenneth Bell, I would like to renew the motions previously
15 made, renew the motions for directed verdict on each of the
16 five counts.

17 Additionally, Your Honor, at this time, I would renew all
18 objections previously made and all motions previously made and
19 ask that those be granted.

20 THE COURT: All right. Those motions have been
21 considered by the Court. I would make the same rulings that I
22 made during trial and I'll allow the conviction to stand.

23 MR. MCCOLLUM: Finally, Your Honor, at this time, on
24 behalf of the Defendant, Kenneth Bell, the Defense would move
25 for a new trial on each of the five counts without naming them

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SENTENCE OF THE COURT

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1 all specifically.

2 THE COURT: The motion is noted and has been heard and
3 the motion is denied.

4 MR. MCCOLLUM: Thank you, Your Honor.

5 SENTENCE OF THE COURT:

6 THE COURT: All right. Mr. Bell, having been found
7 guilty by a jury of your peers of the offenses of burglary in
8 the first degree, criminal conspiracy, armed robbery,
9 possession of a weapon during a violent crime and kidnapping,
10 at this time, the Court is considering sentencing in this
11 matter. I'll first hear from your attorney concerning this
12 matter then I'll give you an opportunity to be heard. I've
13 informed Counsel if members of the family would like to be
14 heard in that regard, I will hear them one at a time. I'll be
15 happy to hear from the attorney first.

16 Yes, sir?

17 MR. MCCOLLUM: Your Honor, may it please the Court? I
18 think Your Honor's fairly familiar with Kenneth Bell as a
19 result of what transpired during the trial. He has no
20 criminal record. I think they stated he never had a traffic
21 violation. He had successfully completed high school, was
22 actually a stellar athlete and had the opportunity to possibly
23 go on and get a college scholarship. There were some things
24 that happened that were outside of his control. He's not
25 really somebody that places blame; he, he, he moved on. But

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SENTENCE OF THE COURT

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1 apparently his football coach had been engaged in some kind of
2 misbehavior. He was ultimately maybe even charged with a
3 crime for doing something with money or doing something
4 inappropriate. But the point of that is that his highlight
5 reels never, were never sent. Apparently he was -- had
6 lettered every year in high school, was an outstanding
7 athlete. He told me he was a running back and had a fantastic
8 career. He was, as his mother said, a straight A student,
9 worked while he was going to high school. In addition to
10 playing at least two sports, football and baseball and doing
11 very well. He was the captain of the football team and I
12 think they were very successful.

13 After that, I think he did go to school a little bit, but
14 in any event, you know, his mother had told him, son, you
15 know, life is long, you're young, you don't know what will
16 happen, so you should do certain things to protect yourself.
17 In other words, if, if, if you don't know about your career,
18 so even something that a lot of people do and certainly
19 there's nothing wrong with it, but getting a tattoo in a
20 visible place or getting piercings or things of that nature;
21 she had cautioned him and advised him against doing that,
22 something that many people do, and he had listened to her and
23 to this day never received anything like that.

24 He then decides to enter the Air Force, is accepted into
25 the Air Force. And I was told at the time he was talking to

1 the recruiter, the recruiter said well what kind of petty
2 crimes do we have to clean up, let me see your tattoos, and
3 the recruiter made the statement that he was the first kid
4 that they had seen that didn't have any issues to be cleared
5 up. He goes into basic training and unfortunately has this
6 sleep walking issue and the liver function or something of
7 that nature, regrettably. All of that had been cleared up by
8 now and he's clear to re-enter the service, which obviously as
9 he stands here today, that's not possible. So, that's who he
10 is.

11 How he got here and moved out from his brother, Buddy's
12 house and into his other brother's house and, and, and
13 whatever he did during that period of time that caused him to
14 make these kind of fatal judgments, apparently is completely
15 outside of his character from birth until that time.

16 Now I understand that there's certain sentencing
17 restrictions here. From what I have seen, Your Honor, the,
18 the, the youthful offender provision is not available to a
19 violent crime. There are three violent crimes. The
20 enhancement sentence for the firearm, as I read the statute,
21 can be consecutive or concurrent. I understand the armed
22 robbery statute and that, that minimum mandatory, but I think
23 clearly, Your Honor, and I hope Your Honor agrees or takes
24 this into consideration, we have great respect for Your
25 Honor's ability and authority to sentence, but I would ask

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SENTENCE OF THE COURT

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1 Your Honor to please consider, giving his background and the
2 harshness of these sentences as they stand, to consider giving
3 him the mandatory minimum sentences and ask Your Honor, that
4 they be run concurrent.

5 THE COURT: All right, Counsel, let me just go over the
6 sentences with you to be sure we are in agreement with what I
7 think they are.

8 Burglary first degree carries a sentence of fifteen to
9 life. Armed robbery carries a sentence of ten years to thirty
10 years. Possession of a weapon during a violent crime carries
11 a possible five years. Criminal conspiracy carries no more
12 than five years and the sentence cannot be greater than the
13 maximum sentence of the underlying charge. Kidnapping carries
14 a sentence of not more than thirty years.

15 Are you in agreement with those possible sentences?

16 MR. MCCOLLUM: I am, Your Honor. The only, the only
17 question I have is about the conspiracy, but I don't think
18 that's a factor.

19 THE COURT: I really don't think that is. Now I have
20 considered the burglary first charge and it's my understanding
21 from the case of State versus Jacobs, that the mandatory
22 minimum cannot be suspended. That's the case that was decided
23 in 2011. You had discussed that during the trial.

24 All right. Now at this time, I'll be happy to hear from
25 your client, Mr. Bell.

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SENTENCE OF THE COURT

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1 Mr. Bell, this is your opportunity to address the Court.
2 I'll be happy to hear from you concerning this matter.

3 MR. MCCOLLUM: Your Honor, I think he's, he's obviously
4 has been very strong; he's overcome with a strong amount of
5 emotion.

6 THE COURT: I understand.

7 MR. MCCOLLUM: He had said to me that he doesn't know
8 what to say.

9 THE COURT: I understand. Okay. Was there members of
10 the family that did wish to speak on his behalf and I'll give
11 him an opportunity to speak in just a moment.

12 Sir, come forward. If you'll come forward to the Counsel
13 table please, sir? I need for you to state your name and your
14 relationship.

15 MR. BUDDY BELL: Buddy Bell, his brother.

16 THE COURT: Yes, sir, I'll be happy to hear from you.

17 MR. BUDDY BELL: Your Honor, he made a mistake. I've
18 already lost one brother. This is my only brother I have
19 left. I don't want to lose him forever. Forty-five years old
20 -- do the math on a mandatory minimum sentence; that's over
21 forty years. She won't see him outside again. I mean, this
22 isn't no light stuff. I just don't want to lose my only
23 brother I have left. He means everything. I made a promise
24 to my mom when he came down that I would keep him safe and I
25 failed that. He literally wanted to write a letter to these

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SENTENCE OF THE COURT

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1 kids just apologizing, but I said you can't contact them. He
2 followed somebody. He was protecting what he feels is another
3 brother. Anyone, if they know that their brothers needed help
4 or their brother needed protection or their brother -- they
5 could do it, too. If I was in a predicament and if my brother
6 needed help, I would be there. Thank you.

7 THE COURT: Thank you, sir.

8 Any other family members wish to be heard?

9 Ma'am, come forward. For the record, I have to get you
10 to state your name and your relationship. I know who you are,
11 but you'll have to tell me.

12 MS. JAWORSKI: I'm Wendy Jaworski; I'm Kenny Bell's
13 mother.

14 THE COURT: Yes, ma'am.

15 MS. JAWORSKI: As my son already stated, I've lost one
16 son. He was an infant. I'm just asking you to please be as
17 lenient as you can. I'd love to see my -- I can't -- at least
18 some TV screen all the time. He's young; he can still come
19 out and be a -- He made a mistake. And now that it's over,
20 I'm gonna say, that picture you saw, he was on K12, which is a
21 very harsh drug and this is what it's come down to. Your
22 Honor, you couldn't hear that because it wasn't allowed to be
23 said, but he was on drugs. And when he got out on bond, we
24 had to lock him down for thirty days in my house to get him
25 off of them again and that's why he looked so different. But

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SENTENCE OF THE COURT

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1 you wouldn't ---

2 THE COURT: Ma'am, ma'am, ma'am, ma'am, you're not
3 allowed to address anyone in the courtroom at this time but
4 me.

5 MS. JAWORSKI: I'm sorry. Please, Your Honor. Thank
6 you.

7 THE COURT: Thank you, ma'am.

8 MR. MCCOLLUM: Your Honor, thank you. Obviously, they
9 love him very much. They weren't just, without minimizing,
10 frankly the seriousness of the case and the evidence, we just
11 ask for whatever leniency the Court can provide.

12 THE COURT: I'd indicated I'd give Mr. Bell another
13 opportunity to speak.

14 Do you wish to speak, Mr. Bell? You don't have to bend
15 over; it'll pick you up. Speak to me straight up.

16 MR. KENNY BELL: I just wanted to say I'm sorry to my
17 family that I disappointed them. I'm sorry to the victims. I
18 never wanted to be there. I was -- I was supposed to be
19 getting my hair cut and going on a date later that night; I
20 didn't even want to be there.

21 MR. MCCOLLUM: Your Honor, he's got a great deal of
22 remorse. We are where we are and we are ready for sentencing
23 whenever it's appropriate.

24 THE COURT: Thank you. I have been informed he has no
25 prior record; is that correct, from the State?

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1 MS. LIVESAY: Yes, sir, Your Honor.

2 THE COURT: Thank you. Anything the State would like
3 share with the Court?

4 MS. LIVESAY: Yes, sir, Your Honor. I think the victim
5 does wish to speak.

6 THE COURT: I'll be happy to hear from him.

7 Sir, if you'll stand. I'll need you to state your name.

8 MR. DEGRUCCIO: My name is Paul Degruccio.

9 THE COURT: You don't have to bend over. Just speak to
10 me. Thank you, sir.

11 MR. DEGRUCCIO: I just wanted to offer my condolences to
12 Kenny and his family and I would ask that you show him some
13 leniency and I wouldn't wish this fate on my worst enemy.
14 That's all I have to say.

15 THE COURT: Thank you, sir.

16 I believe he was out on bond. Is he claiming any credit
17 for time served?

18 Oh, I'm sorry, I didn't realize there was another one. I
19 apologize to you, sir. Name please?

20 MR. MEIJER: My name is Erik Meijer.

21 THE COURT: Yes, sir.

22 MR. MEIJER: I as well would like to state my
23 condolences. I wouldn't wish -- I would ask for your
24 leniency. He's already suffering way more charges than the
25 minimum would have, would have been if he had taken that. And

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1 at the same time, I had thought about reacting; there was a
2 chamber in the bullet so I feel bad, but I definitely do not
3 want him to have maximum sentences. I mean, if I had
4 responded, I could have accidentally been shot. So it's not
5 like this is something that can be overlooked, but please at
6 least give him leniency. I wish he had taken the deal; he'd
7 have been out in two years.

8 THE COURT: Thank you, sir.

9 Anything else from the State?

10 MS. LIVESAY: No, Your Honor, the State just requests the
11 minimum sentence.

12 THE COURT: Thank you.

13 MR. MCCOLLUM: Your Honor, in response to Your Honor's
14 question, I think he was arrested immediately on February the
15 2nd, 2013. It looks like his bond was signed February the
16 11th, 2013.

17 THE COURT: So, the difference the ---

18 MR. MCCOLLUM: Not much.

19 THE COURT: How much?

20 MR. MCCOLLUM: Nine days.

21 THE COURT: Nine days.

22 MR. MCCOLLUM: Does that sound right?

23 THE COURT: All right. You can be seated. It'll take me
24 a moment to complete the sentencing sheets.

25 Mr. Bell, it's unfortunate, sir -- if you'll stand

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1 please. It's unfortunate that two of the offenses that you've
2 been convicted of carry with them mandatory minimum sentences.
3 The legislature has made a choice in that regard and of
4 course, the Courts are bound by that choice. I respect their
5 abilities to make those laws and it's my responsibility to see
6 that they are properly enforced. Occasionally, cases come
7 along where the Court wishes it had more discretion than is
8 allowed in this situation and this is one of those cases.

9 Before I name -- announce the sentencing, I will tell you
10 that the kidnapping offense carries a possible requirement of
11 sex offender registration. I have noted on the sentencing
12 sheet that this crime did not involve any sex offense;
13 therefore, that question is no longer an issue. I've taken
14 that out of the question.

15 Now, as to the charges, the kidnapping, or excuse me, the
16 armed robbery and burglary as I said, carry mandatory minimum
17 sentences. In the case of burglary first that mandatory
18 minimum sentence is fifteen years. In the case of armed
19 robbery, the mandatory minimum sentence is ten years. In the
20 other cases the criminal conspiracy the sentence is five years
21 and the possession of a weapon the sentence is five years and
22 the kidnapping the sentence is ten years. I have run all of
23 those sentences concurrently and given you credit for the time
24 that you had requested.

25 Sir, I wish you luck.

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1 MR. MCCOLLUM: Thank you, Your Honor.

2 THE COURT: The Court's adjourned in this matter. Take
3 the Defendant into custody.

4 (ADJOURNED - 3:24.)

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CERTIFICATE OF COURT REPORTER

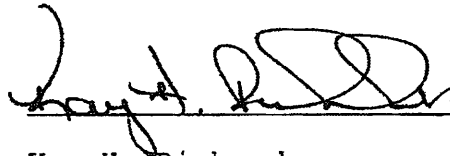
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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina versus Kenneth Jordan Bell, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on August 12-15, 2013.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson

Official Court Reporter

January 30, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH JORDAN BELL,

APPELLANT.

APPELLATE CASE NO. 2013-001841

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court erred in instructing the jury that if the jury failed to reach a verdict on one of the charges against Appellant, a mistrial would be declared, the case would be retried, and the parties would “go through this whole process again;” the Trial Court erred by not clarifying that the jury's failure to reach a verdict on any one indictment would necessitate a new trial on that particular indictment, not a new trial of the entire case.

- II. The Trial Court erred in excluding evidence that one of the alleged victims and a co-defendant had entered into a previous drug transaction for which the alleged victim owed the co-defendant money and that the reason the co-defendant and Appellant went to the alleged victim's apartment was to collect money for this drug debt; the evidence was relevant and admissible because (1) it was a part of the *res gestae* of the alleged crime; (2) it had bearing on the Appellant's intent in going to the alleged victim's apartment and whether Appellant had the required *mens rea* for the charges against him; and (3) it showed bias on the part of the alleged victim for which Appellant was entitled to confront him with on cross-examination. Furthermore, the probative value of this evidence was not substantially outweighed by any prejudicial effect to the State's case and to the alleged victim, especially where the Trial Court had already allowed the jury to hear that the alleged victim had previously been convicted of drug charges.

STATEMENT OF THE CASE

On March 28, 2013, Appellant Kenneth Jordan Bell was indicted by the Horry County Grand Jury for (1) first degree burglary; (2) armed robbery; (3) kidnapping; (4) possession of a weapon during the commission of a violent crime; and (5) criminal conspiracy. R.376.

Appellant was tried before the Honorable Roger L. Couch and a jury on August 12-15, 2013. R. 1. Appellant was represented by Gregory M. McCollum, and the State was represented by Assistant Solicitor Nancy R. Livesay. R. 1.

After the jury sent out two notes inquiring what would happen if the jury could not agree on one charge and what would happen if the jury was deadlocked on one charge, the Trial Court gave the jury an Allen¹ charge. R. 344, l. 24 – 354, l. 8; Court's Exs. 8 and 10. The jury thereafter returned with a guilty verdict on all counts. R. 356, l. 22 – 357, l. 16. Judge Couch sentenced Appellant to (1) fifteen years for first degree burglary; (2) ten years for armed robbery; (3) ten years for kidnapping; (4) five years for possession of a weapon during the commission of a violent crime; and (5) five years for criminal conspiracy. All sentences were to run concurrently. R. 372, ll. 15-24; Sentencing sheets.

Appellant timely filed and served his Notice of Appeal.

¹ Allen v. United States, 164 U.S. 492 (1896).

STATEMENT OF FACTS

On February 2, 2013, Christopher Tanner Clark was living in an apartment with two roommates, Paul Degruccio and Scott McDonald. The apartment had three bedrooms and two bathrooms and was located on the second floor. R. 32, l. 18 – 34, l. 1.

During the middle of the day on February 2, 2013, Clark called 911 because he heard a commotion out in the living room. He poked his head out of his bedroom and said he immediately saw two guys coming inside the apartment. One of the guys had a gun. He could not really see the other guy. He said both guys had on black hoodies and blue jeans. He could not see their faces or tell if they were white or black. Clark immediately shut his bedroom door and called 911. While he stuck his head out of his bedroom door, he never came completely out of his bedroom. R. 34, l. 5 – 35, l. 7; 39, l. 20 – 40, l. 1 – 11.

Clark told the 911 operator that two guys had just busted in and one had a gun. He claimed he saw the guys put the gun to his roommate's face and tell him to sit down in the chair. He then heard the guys take his roommate Paul back to Paul's bedroom and heard the guys arguing with Paul in his bedroom. Clark heard Paul continue to argue with the guys and ask why are you doing this. R. 35, ll. 17-25; 42, ll. 18-24. Other than that, Clark did not see anything, he just heard everything going on inside the apartment. R. 36, ll. 1-2.

Clark did not hang up with 911 until after he looked out his window and saw the police arrive. R. 36, ll. 3-7. He could see the guys walking to a red Mitsubishi, and he observed police ordering them to the ground and arresting them. R. 48, ll. 3-14. Clark's 911 call was played for the jury. R. 38, ll. 5-6.

Clark described who was present in the apartment on February 2, 2013. Erik Meijer was in the living room playing video games on his computer. Paul was in his

bedroom, and Scott was in his bedroom asleep. Clark was in his bedroom at the time too. They were all playing video games. Clark, Paul, and Scott all lived in the apartment, but Erik did not. R. 38, ll. 16 – 2; 54, ll. 15-16.

On cross-examination, Clark admitted that no one threatened him that day or pointed a gun at him. He also testified that no one took any property from him even though he owned valuables such as a flat screen television, a computer, and an Android smart phone. R. 50, l. 23 – 51, l. 17. He acknowledged that during the incident no one attempted to come into his bedroom or even tried to jiggle the door handle. R. 52, ll. 4-9.

Clark confirmed that his roommate Scott was asleep through the whole entire incident and had to be woken up after the two guys were arrested. R. 52, l. 10 – 53, l. 14. He also reiterated that Erik Meijer was in the living room during the entire incident and that to his knowledge, no one took anything from Erik. R. 53, l. 17 – 54, l. 11.

Clark further confirmed that the incident took place during the middle of the afternoon while the sun was shining. He said the apartment was “pretty well lit” during the daytime. R. 56, ll. 3-15.

Clark also testified that when he saw the two individuals come into the apartment, his roommate Paul was at the time looking out the window of the foyer area. R. 57, l. 1 – 14. Clark testified that since the incident, he learned that Paul owed money to Christopher Bell, one of the two men who entered the apartment that day. Clark said that Paul was the only one who owed Christopher Bell any money – not Clark, Scott or Erik. R. 63, ll. 2 – 14. Clark said that after the incident, Paul told him his laptop and a digital camera were taken from him. R. 63, l. 15 – 64, l. 2.

Clark heard Paul arguing with one of the individuals who entered the apartment. He heard Paul arguing back to one of the individuals. It sounded like Paul was mad and upset that the incident was taking place. R. 64, ll. 3 – 25.

Paul Degruccio testified that February 2, 2013 started off kind of like a normal day. He received a telephone call from a female identifying herself as Jasmine, a friend of Paul's. Based on this telephone call, he expected Jasmine to come over to his apartment. R. 70, ll. 12 – 71, l. 17; 72, ll. 2-11. Paul said he felt a little fishy about the situation because he was not too close to Jasmine and she was being really friendly. Erik convinced Paul that he should hang out with Jasmine because Paul had been cooped up in the house too much. R. 72, ll. 14-23.

Paul texted Jasmine the directions to his apartment. He waited for Jasmine to arrive at his apartment. He then received a text that she was at the apartment, so he went and cracked the door and was looking out the window into the parking lot for someone. He said he did not see anyone until the door was busted open and there were two individuals behind him, one with a tire iron and one with a gun. R. 73, ll. 3 – 22.

Paul said he did not remember what the individuals were wearing, but claimed both were wearing masks and one had a gun and one had a tire iron. R. 75, l. 6- 76, l. 2. He said the individual with the tire iron told him to "give me all your shit." When Paul heard the voice, he recognized it as Christopher Bell's voice. At that point Christopher Bell took off his mask, and Paul knew him as Christopher Bell. R. 76, ll. 3 - 19. Paul testified that Christopher Bell was holding the tire iron and the other guy was holding the gun. R. 76, ll. 20-24.

Paul claimed Appellant pointed the gun at him several times. R. 77, ll. 4-6. Paul said Erik was also in the living room sitting on the couch when this happened and Erik just stayed there. R. 77, ll. 10-16.

Paul said that after Christopher Bell took his mask off, Christopher Bell first kind of pushed him into the chair and then Christopher Bell took Paul into his bedroom basically telling Paul that he was going to give Christopher Bell whatever he had. R. 77, ll. 17-24. Paul claimed the other individual with the gun, who was still masked at the time, stood in the living room with his gun trained on Erik so that Erik could not leave. R. 77, l. 25 – 78, l. 2.

Paul testified that he and Christopher Bell went into his bedroom and Christopher was rummaging through Paul's stuff and throwing Paul's things around. Paul was upset about the situation, particularly due to his past history with Christopher Bell. Paul was talking to Christopher Bell. Paul said he owed Christopher Bell money for something and that the two had talked a couple of months back about the money owed. R. 78, ll. 5-11.

While Paul was arguing with Christopher Bell about their past, the other individual with the gun allegedly came into Paul's bedroom, stuck the gun in Paul's face and told him to sit down. R. 78, ll. 14-25. Christopher Bell began asking Paul where his computer stuff was, and Paul said he gave Christopher Bell his laptop and camera. Paul testified that the two individuals then rushed out of the apartment with his laptop and camera. R. 80, l. 19 – 81, l. 2.

With respect to the money that Paul owed Christopher Bell, he said that before February 2, 2013, the last time he discussed owing money to Christopher Bell was two to three months prior when Paul ran into him at the Food Lion. Paul walked up to Christopher

and apologized for what had happened and said he just did not have the money to pay Christopher back. He said that Christopher did not threaten him or act hostile toward him at that time. R. 83, ll. 5-25; 86, l. 22 – 87, l. 1. Christopher did tell him at the time that he would like the money. R. 84, ll. 24-25. Paul testified that he had known Christopher Bell for a couple of years. R. 85, ll. 3-4.

On cross-examination, Paul admitted that he owed Christopher Bell around \$800. R. 100, ll. 3-11. Paul also admitted that he had a felony conviction, and the Trial Court allowed the jury to hear that Paul had been previously convicted for possession of marijuana with intent to distribute. R. 100, ll. 12-14; 19, l. 25-125, l. 7.

What the Trial Court did not let the jury hear was that when Paul was arrested and charged with possession with intent to distribute marijuana, the drugs that Paul was arrested for were given to him by Christopher Bell. R. 189, l. 14 – 190, l. 1. Those drugs were the reason why Paul owed Christopher Bell money and why Christopher Bell came to Paul's apartment that day to collect the money. R. 118, ll. 1-4. Paul had paid Christopher \$800 for a half of a quarter-pound of marijuana but still owed Christopher a remaining \$800. Therefore, Paul had only paid Christopher half of what was owed for the drugs. Paul was unable to pay the remaining \$800 because he was arrested and the police seized the marijuana. R. 118, l. 3 – 119, l. 12. While the Trial Court believed this testimony could be relevant to the charges for which Appellant was on trial, the Trial Court would not allow the jury to hear this proffered testimony of Paul. R. 122, l. 11 – 124, l. 2.

On cross-examination, Paul again admitted to having a heated discussion with Christopher Bell during the incident. He agreed that Christopher and Appellant had no words or heated discussions with the other individuals in the apartment – Clark, Erik, and

Scott. R. 126, l. 12 – 127, l. 23. Paul also agreed that only his property was taken and no one took any property of Clark, Erik, or Scott. R. 127, l. 24 – 128, l. 12; 158, ll. 13-15. Paul received no physical injuries during the incident. R. 128, ll. 15-16.

Erik Meijer testified that he was at Paul's apartment the day of the incident and occasionally stayed the night there every once in a while even though he did not live there. R. 161, ll. 7-12. On the day of the incident, he was hanging out with Paul in Paul's bedroom when Paul received a text from the girl that was supposed to be coming over to the apartment. Paul then ushered Erik out of the bedroom and into the living room. Erik was just sitting in the living room. Erik said Paul unlocked the front door and lightly cracked it and was looking out the front window when out of the blue two people busted through the door wearing masks, one with a gun and one with a tire iron. R. 161, ll. 13 – 23.

Erik said he noticed the black masks and the silver of the gun but did not pay too much detail to what the individuals were wearing. R. 162, ll. 16 – 23. He said the gun was mainly pointed at Paul, although Erik testified that the gun made a quick pass by him. R. 162, l. 24 – 163, l. 4. Erik testified that the individuals at first had Paul sit down in a chair and then after Paul identified Christopher Bell, Christopher took his mask off and led Paul back to Paul's bedroom while Appellant stayed where he could look down the hallway and watch Erik at the same time. R. 163, ll. 5 – 10. Erik testified that while Appellant was standing in the hallway, most of the time he just had his arms crossed and was not pointing the gun at Erik but just watching him. R. 164, ll. 4 – 8. Erik never left the living room and saw the two individuals walk out the front door. R. 166, ll. 2 – 6.

Erik testified on cross-examination that he had his own laptop with him at the apartment on the day of the incident that was worth about \$1300 but no one took it or any

other valuables from him that day. R. 171, l. 15 – 172, l. 24. It was Christopher Bell who walked out of the apartment with Paul's laptop and camera. R. 174, ll. 8 – 15. Erik was not physically harmed during the incident. R. 174, ll. 16-17. Scott never woke up during the incident and that no one tried to enter Scott's room. R. 174, ll. 18-25. Erik agreed that the only person who had property taken was Paul. R. 175, ll. 1-3.

Officer Natalie Boyd of the Horry County Police Department was dispatched to the scene where she saw two subjects in black hoodies, blue jeans and socks over their shoes, one about to enter the driver's door of the red-colored vehicle and one about to enter the back passenger door. She ordered the subjects to the ground and also observed a female passenger already seated in the front passenger seat of the vehicle. All three subjects were placed in handcuffs. R. 175, l. 17 – 181, l. 8. Officer Boyd identified Christopher Bell as the subject about to get in the driver's seat and identified Appellant as the individual about to get in the back passenger seat. The female in the front passenger seat was Tonie Pasquale. Officer Boyd said there was not a girl named Jasmine in the vehicle. R. 184, l. 11 – 185, l. 22.

Officer Boyd located a laptop and camera, as well as a black tire iron. She determined the laptop and camera belonged to Paul. R. 259, l. 20 – 260, l. 17. The tire iron was found under the front wheel of the vehicle by the driver's door. R. 193, l. 23 – 194, l. 4. A gun was found in the back floorboard area of the vehicle. R. 194, ll. 5-13. A .45 bullet was found in Appellant's left pocket. R. 194, ll. 14 – 18; 196, l. 12 – 197, l. 2. The gun was a .45 caliber. R. 197, ll. 3-6. Officer Boyd agreed that Appellant complied with her demands. R. 207, ll. 8-16.

Officer Timothy Cast of the Horry County Police Department testified that there were four rounds in the magazine of the gun and one live round in the chamber. R. 212, ll. 15-18; 222, ll. 21-25. When one round is in the chamber, the gun is ready to shoot and no extra steps have to be taken to fire the gun. R. 223, ll. 1 – 24. Officer Cast also admitted though that one way to unload a gun would be to move rounds into the chamber and take the bullets out of the chamber until the gun was completely empty. If someone was not finished unloading a gun this way, there could possibly be a round left in the chamber. R. 238, l. 18 - 241, l. 2. Therefore, just finding a round in the chamber of the gun would not necessarily mean that someone had a round in the chamber with the intent to shoot.

Appellant's mother testified that Appellant and his brother Christopher Bell were half-brothers who shared the same father. R. 254, ll. 5-8. She raised Appellant in Pittsburgh where he was a straight A student in high school and captain of the football and baseball teams. R. 252, ll. 19-22; 254, l. 17 – 255, l. 7. Appellant enlisted in the Air Force but a medical condition with his liver caused him not to complete basic training. He was eligible to re-enlist after the medical condition cleared. R. 257, l. 20 – 258, l. 21. Appellant eventually moved down to Horry County to live with another brother, but ended up associating with his half-brother Christopher. R. 260, l. 24 – 261, l. 11. Appellant's mother described Appellant as a very loyal person who was very protective of his family. R. 262, l. 19 – 263, l. 3.

Appellant's brother Buddy Bell testified Christopher Bell told Buddy that he, Christopher, had given Appellant the gun. R. 265, ll. 2 – 17.

After the case was given to the jury, the jury struggled with their verdict, twice sending notes to the trial judge inquiring what would happen if the jury could not agree on

one charge and what would happen if the jury was deadlocked on one charge. R. 344, l. 24 – 345, l. 2; 352, ll. 7-10; Court Exs. 8 and 10. The jury eventually convicted Appellant on all charged counts. R. 356, l. 22 – 357, l. 16.

ARGUMENT

- I. **The Trial Court erred in instructing the jury that if the jury failed to reach a verdict on one of the charges against Appellant, a mistrial would be declared, the case would be retried, and the parties would “go through this whole process again;” the Trial Court erred by not clarifying that the jury’s failure to reach a verdict on any one indictment would necessitate a new trial on that particular indictment, not a new trial of the entire case.**

During its deliberations, the jury twice sent out notes to the Trial Court indicating that it was deadlocked on at least one of the charges:

What happens if there is one charge that the jury cannot agree on?

R. 344, l. 24 – 345, l. 2; Court’s Ex. 8.

What happens if we are deadlock [sic] on one charge?

R. 352, ll. 7-10; Court’s Ex. 10 (emphasis in original).

After the jury’s second question, the Trial Court gave an Allen charge to the jury. R. 352, l. 11 – 354, l. 8. As a part of this charge, the Trial Court instructed the jury as follows:

If you do not agree on a verdict in this case, on one of the charges in that case, it would be my duty to declare what is referred to as a mistrial. In that case, it does not mean that anybody wins; it just means that at some point in the future time either I or some other judge will try this case with some other jury sitting where you now sit. The same participants will come, perhaps the same lawyers will ask basically the same questions and get basically the same answers and we will then go through this whole process again.

Now, you were selected in the same manner and from the same source as any future jury in this case would be chosen and there’s no reason for me to believe or suppose that the case will ever be submitted to twelve more intelligent or impartial or conscientious or competent jurors than you, or that any more clearer evidence will be produced by one side or the other. So, what I’m going to ask you to do is to return to your deliberations. Consider what I’ve just said to you and again re-examine the positions in light of my charge in this matter. So, I’m gonna ask you to return to the jury room and continue your deliberations.

R. 353, l. 14 – 354, l. 8 (emphasis added).

At the conclusion of the Allen charge, Appellant's counsel raised the issue that since Appellant was subject to multiple indictments, he would only be tried again on any indictment for which the jury could not reach a verdict. The Allen charge suggested to the jury that the entire case would have to be retried if the jury could not reach a verdict on one indictment. The Trial Court decided not to make any changes to the Allen charge, stating that he had already informed the jury at the beginning of its deliberations that that they were to weigh the evidence and decide each offense separately. R. 354, l. 15 – 356, l. 1.

While the Trial Court may have instructed the jury at one point during the trial that the jury was to decide each indictment separately and distinct from the decision it makes on every other indictment, the Trial Court, in its Allen charge to the jury, did not correctly answer the question posed by the jury: "What happens if we are deadlock [sic] on one charge? Tr. 503, ll. 7-10; Court's Ex. 10 (emphasis in original); see also State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986), *overruled on other grounds by*, Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) and Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion.").

The Trial Court's Allen charge informed the jury that if it were deadlocked on one charge, the Trial Court would have to declare a mistrial and that "this case" would have to be tried at a future time before the same or some other judge with the same participants and perhaps the same lawyers. The Trial Court told the jury: "[W]e will then go through *this whole process again.*" R. 353, ll. 14-22 (emphasis added).

The Trial Court's charge to the jury that "this case" would have to be retried and the parties would have to go through "the whole process again" if the jury remained deadlocked on just one charge was an incorrect statement of the law. In Pauling v. State, 350 S.C. 278, 565 S.E.2d 769 (2002), a deadlocked jury submitted a written question asking the trial judge whether the guilty verdicts would stand on the other six charges should a unanimous decision not be reached on the two counts of murder or would the whole case be retried. After the jury returned to the courtroom, the trial judge instructed: "... you gave me a question. If you do not reach a verdict on the two counts, it would be a mistrial. The whole case would have to be tried over." After returning to deliberations, the jury returned its verdict acquitting the petitioner of one murder charge and convicting him on the remaining seven charges, including the other murder charge. Id. at 283, 565 S.E.2d at 771.

The Supreme Court has held the jury's failure to reach a verdict on any count in the indictment would necessitate a new trial on the particular count, not a new trial of the entire case. Id. at 284, 565 S.E.2d at 772 (citing State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996) and State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986)). In Pauling, the trial judge instructed the jury to the contrary-that failure to reach a verdict on the murder charges would require a new trial of the entire case. Because the trial judge's response was clearly erroneous, Pauling's trial counsel was deficient in failing to object to the trial judge's charge and petitioner was entitled to the grant of post-conviction relief and a new trial. Pauling, 350 S.C. at 284-85, 565 S.E.2d at 772-73.

The Trial Court's instruction to the jury in this case that its failure to reach a verdict on one charge would require the parties to go through the whole process again was in direct contradiction to the Supreme Court's holding in Pauling. After Appellant's counsel raised

the issue of whether the charge was confusing, the Trial Court should have corrected its Allen charge to inform the jury that its failure to reach a verdict on one indictment would not necessitate a new trial of the entire case. The jury was instead left with the impression that if it could not reach a verdict on one charge, all five charges would have to be retried. The jury then reached a guilty verdict on all five charges about three hours after the Trial Court's Allen charge. R. 352, l. 4 – 357, l. 16.

Appellant is entitled to a new trial where the Trial Court erroneously instructed the jury that the case would be retried and the parties would go through the whole process again if the jury was deadlocked on one charge without clarifying that a retrial would be required only on the indictment as to which the jury could not reach a verdict.

II. The Trial Court erred in excluding evidence that one of the alleged victims and a co-defendant had entered into a previous drug transaction for which the alleged victim owed the co-defendant money and that the reason the co-defendant and Appellant went to the alleged victim's apartment was to collect money for this drug debt; the evidence was relevant and admissible because (1) it was a part of the *res gestae* of the alleged crime; (2) it had bearing on the Appellant's intent in going to the alleged victim's apartment and whether Appellant had the required *mens rea* for the charges against him; and (3) it showed bias on the part of the alleged victim for which Appellant was entitled to confront him with on cross-examination. Furthermore, the probative value of this evidence was not substantially outweighed by any prejudicial effect to the State's case and to the alleged victim, especially where the Trial Court had already allowed the jury to hear that the alleged victim had previously been convicted of drug charges.

During pre-trial motions, the State made a motion *in limine* to exclude any evidence that Paul Degruccio had been arrested and convicted for the possession with the intent to distribute marijuana and that Paul had purchased this marijuana that was the subject of the arrest and conviction from Christopher Bell. The State furthermore wanted excluded as evidence from trial the fact that Paul owned a large amount of money to Christopher Bell for that particular marijuana and that the reason Christopher Bell and Appellant went over to Paul's apartment the day of the incident was to collect on the money Paul owned for the marijuana Christopher Bell had given to him. The State argued that this evidence was irrelevant to the incident that occurred at Paul's apartment and to the charges against Appellant arising out of that incident. R. 12, ll. 2 – 14, l. 1.

Appellant's counsel argued that the evidence of the drug transaction between Paul and Christopher Bell was relevant and was part of the *res gestae* of the alleged crime and was evidence of bias on the part of Paul as a witness and evidence of Appellant's intent in going to the apartment:

[I]n this particular case, I would submit that the fact that the Co-defendant, Christopher Bell, participated in drug transactions with . . . Paul Degruccio . .

. was the purpose for Christopher Bell in taking others to go to the apartment to get his money that was owed to him or, or settle the debt or something of that nature. So we would submit the fact that I think the evidence would establish that Mr. Christopher Bell and Mr. Paul Degruccio had transacted illegal drug transactions in the past. There was a debt owed by Mr. Degruccio . . . to the Co-defendant Christopher Bell and that was the reason, along with other factors, why Mr. Christopher Bell went to the apartment in the first place and then took his brother [Appellant] with him. I would submit there are several factors here. One is that the - - we're talking about cross-examination here, is the way I see this coming up. ***Kenneth Bell has the right - - obviously under the right to confront witnesses, has the right to a full and complete confrontation of the witnesses. It can go to the bias of the witness. It can go to the reason for being there and ultimately, could go to the res gestae or the purpose of the crime.*** Now, there are situations where drug use has been exclud[ed] to protect the Defendant or the person on trial, but even those situations it's been allowed if it were determined to [be] part of the crime or, as the Court usually uses the term, *res gestae*. So we could submit under those reasons if Mr. Paul Degruccio testifies that that would be a proper subject for cross-examination

R. 14, l. 18 – 15, l. 20 (emphasis added).

The State argued in response that the prejudicial effect of such testimony would outweigh any probative value of the evidence, and the Trial Court stated that he tended to agree with the State. R. 17, ll. 12 – 21. The Trial Court, however, recognized that Appellant had the right to confront witnesses and present whatever defense he had. R. 17, ll. 21-23. The Trial Court then stated that he had to decide whether the prejudicial effect of the testimony outweighed its probative value. R. 18, ll. 12-14. Appellant's counsel again argued that the evidence was relevant and went to the intent of Appellant in going to Paul's apartment on the day of the incident in terms of the burglary and armed robbery charges against him. R. 19, ll. 11-14; ll. 22-25. Appellant's counsel further argued that it was not unduly prejudicial to the State's case to "to prove the truth of what happened in the case as part of the reasoning of the case and the *res gestae* and the true facts of the case" R. 20, ll. 1-5.

The Trial Court then ruled that it would allow Appellant to show evidence that the intent of going over to the apartment was to collect a debt, but the Trial Court would not allow Appellant to characterize the debt as a drug debt stemming from a drug transaction, finding the prejudicial effect of that evidence would outweigh the probative value of the evidence. R. 20, ll. 6-18.

During Appellant's cross-examination of Paul Degruccio, Appellant elicited the following testimony from him as proffer of his cross-examination of Paul. When Paul was arrested and charged with possession with intent to distribute marijuana, the drugs that Paul was arrested for were given to him by Christopher Bell. R. 117, l. 14 - 118, l. 1. Those drugs were the reason why Paul owed Christopher Bell money and why Christopher Bell came to Paul's apartment that day to collect the money. R. 118, ll. 1-4. Paul had paid Christopher \$800 for a half of a quarter-pound of marijuana but still owed Christopher a remaining \$800. Therefore, Paul had only paid Christopher half of what was owed for the drugs. Paul was unable to pay the remaining \$800 because he was arrested and the police seized the marijuana. R. 118, l. 3 - 119, l. 12.

Appellant's counsel again argued to the Trial Court that this evidence should be heard by the jury:

I think it's part of the crime, the body of the crime, the *res gestae* I think it explains the, the motive of Christopher Bell. Now Kenneth Bell, for the reasons that we'll get into, felt the need to, to protect or, or, or safeguard his brother, whether that's effective in this case or not, but that's ultimately where we're going with this. I would submit that that has relevance for those reasons. There are these prior dealings with each other and there's been evidence that no one else in terms of robbery and a theft, no one else was, was - - and I understand the legal part of it. He was the target, if you will, of the actions of Christopher Bell in the alleged actions of Kenneth Bell. So I think it's relevant

R. 121, l. 14 – 122, l. 2.

The Trial Court said the issue was not relevance because he agreed the evidence could be relevant but the issue was whether or not its prejudicial effect outweighed the probative value of the evidence. R. 122, l. 3 – 12. Appellant's counsel argued that the probative value of the evidence did outweigh any prejudicial effect to the State because the evidence went to intent and the bias of the State's witness in testifying against Appellant:

I think it goes to the intent on behalf of at least the Co-defendant and may be separate intent regarding [Appellant] here on trial. Obviously, Your Honor, I think I should be allowed to go into it. Okay. I think it is not unduly prejudicial. Most cases that deal with prejudice are, are the Court's taking care not to unduly prejudice the Defendant so that he receives due process and receives a fair trial. As I understand the role of our system and the advocate, the role that I have, is I am supposed to question the, the bias and the ability of the witness to be truthful or, or any, any way, shape or form . . .

R. 122, ll. 13-24.

While the Trial Court ruled that Appellant would be allowed to ask Paul Degruccio whether he had been convicted of possession with intent to distribute marijuana, the Trial Court ruled that Appellant would not be allowed to ask about the extrinsic facts and circumstances of that conviction, including the testimony of Paul in the proffered cross-examination regarding the fact that the drugs that were the subject of his arrest and conviction were given to him by Christopher Bell and that he still owed Christopher Bell \$800 for those drugs and that the reason Christopher Bell and Appellant came to his apartment that day was to collect this money owed. R. 123, l. 25 – 125, l. 7.

The Trial Court erred in not allowing Appellant to introduce this evidence where the evidence was highly probative as it was a part of the *res gestae* of the alleged crime and explained the story of why Appellant ended up at Paul's apartment. The evidence went to

the element of intent and whether Appellant went to Paul's apartment with intent to commit a crime therein. Appellant also had a Sixth Amendment right to cross-examine Paul concerning bias under the Confrontation Clause, and this evidence was relevant to the bias of Paul. The probative value of this evidence outweighed any prejudicial effect to the State or to Paul as witness, especially where the Trial Court allowed the jury to hear that Paul had been previously convicted of possession with intent to distribute marijuana. The Trial Court therefore clearly abused its discretion in excluding this evidence.

First, the evidence was probative and admissible because it was part of the *res gestae* of the incident. There is no doubt that if the State had wanted this evidence admitted as a part of the *res gestae* of the crime that it would have been permitted by the Trial Court. The evidence in the record establishes a relationship between the drug transaction between Paul Degruccio and Christopher Bell and the reason why Christopher Bell and Appellant went to Paul's apartment. Therefore, there is a logical relevance between Paul and Christopher's drug transaction and the alleged crimes. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014), our Supreme Court quoted United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) to describe the admission of evidence where it is a part of the *res gestae* of the crime:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other

...’ [and is thus] part of the *res gestae* of the crime charged.” And where evidence is admissible to provide this “full presentation” of the offense, “[t]here is no reason to fragmentize the event under inquiry” by suppressing parts of the “*res gestae*.”

Adams, 322 S.C. at 122, 470 S.E.2d at 370-71.

In this case, the drug transactions between Paul and Christopher Bell were inextricably intertwined with the crimes with which Appellant was charged and furnished the context and the reason why Appellant went to Paul’s apartment with his half-brother Christopher Bell. The evidence was necessary to provide a complete story or explanation of the pending offenses against Appellant. This evidence therefore was admissible and probative as a part of the *res gestae* of the crime. See Adams, 322 S.C. at 117-22, 470 S.E.2d at 368-71 (holding evidence of defendant’s drug use prior to charged crimes was admissible to show motive and as part of the *res gestae*); see also State v. Williams, 321 S.C. 455, 460-63, 469 S.E.2d 49, 52-54 (1996) (holding witness’ testimony concerning murder defendant’s motive, that victim may have stolen defendant’s crack cocaine, was admissible as part of the *res gestae*).

Second, the evidence was probative as to the intent and motive of Appellant in going with Christopher Bell to Paul’s apartment. An element of first degree burglary is that a person “enters a dwelling without consent and with the intent to commit a crime in the dwelling.” S.C. CODE ANN. § 16-11-311(A). If Appellant did not have intent to commit any crime in Paul’s apartment when he went inside because he thought he was just going inside with his brother to collect money owed by Paul to Christopher and thought he might end up needing to protect Christopher since the collection of a drug debt could possibly turn into a bad situation, then Appellant would not necessarily have had intent to commit a crime

in the apartment when he first entered it. The jury was entitled to hear this information to make an informed decision on Appellant's intent in entering the apartment.

This evidence would have also been evidence concerning the *mens rea* required for the charged offenses against Appellant. "Criminal liability is normally based upon the concurrence of two factors, an evil meaning mind [and] an evil doing hand." United States. Bailey, 444 U.S. 394, 402 (1980) (internal citations omitted). The jury was also entitled to hear this evidence to determine whether Appellant had the required *mens rea* for the crimes charged against him when he went to the apartment of Paul that day.

Finally, the evidence excluded by the Trial Court was admissible to show the bias of Paul and whether his account of the events that occurred in his bedroom was accurate, especially given that he was the only witness at trial that knew what occurred in his bedroom between him, Christopher Bell, and Appellant as the other three individuals in the apartment did not see what happened in Paul's bedroom.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002) (quoting State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)). The Sixth Amendment is applicable to the states through the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400 (1965).

"A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause." Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (citing Davis v. Alaska, 415 U.S. 308 (1974) and State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991)). "On cross-

examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness.” Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (internal citations omitted); see Rule 608(c), SCRE (“Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.”).

Paul himself was involved in drug dealings and drug transactions with Christopher Bell, knew he owed money to Christopher Bell relating to these transactions, and had a motivation to be less than truthful at trial to protect himself from his own involvement in drug activity. Appellant should have been allowed to confront Paul about his bias in his testimony against Appellant about the events occurring that day at his apartment and in his bedroom. By excluding this evidence, the Trial Court erroneously limited Appellant’s ability to show a prototypical form of bias on the part of the witness and thereby expose to the jury the facts from which a juror could appropriately draw inferences relating to the reliability of the witness. See Mizzell, 349 S.C. at 331, 349 S.E.2d at 317.

The Trial Court, while agreeing that the evidence was relevant, excluded the evidence of the drug transaction between Paul and Christopher Bell and the real reason why Christopher Bell and Appellant went to Paul’s apartment, finding that its prejudicial effect outweighed its probative value. As explained above, the evidence was highly probative to Appellant’s defense. Furthermore, relevant evidence should only be excluded “if its probative value is *substantially outweighed by the danger of unfair prejudice*” Rule 403, SCRE (emphasis added).

The Trial Court in this case did not find that the probative value of the evidence was “*substantially outweighed*” by the prejudicial effect of the evidence as required by Rule 403, only that the prejudicial effect outweighed the probative value of the evidence.

R. 20, ll. 14-18. The standard is “*substantially outweighed*,” and the Trial Court did not follow this standard.

Second, the prejudice must be “*unfair prejudice*,” not just any prejudice. The jury already heard that Paul had a previous conviction for possession with intent to distribute marijuana, so there was really no additional prejudice caused to the State’s case or to Paul by the proffered evidence Appellant wanted admitted. R. 124, l. 25 – 125, l. 7.

There is also no unfair prejudice to the State’s case or to Paul where the evidence Appellant sought to have admitted was a true account of the full reason why Appellant and Christopher Bell went to Paul’s apartment. Just because evidence may be prejudicial to the State’s case or hurt the State’s case does not mean that the evidence was *unfairly prejudicial* evidence which would cause a jury to decide the case on an improper basis.

“Unfair prejudice means an undue tendency to suggest decision on an improper basis.” State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176. (2009). “Unfair prejudice does not mean the damage to a defendant’s [or State’s] case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal citation omitted). “Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.” State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). “All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.” State v. Collins, 398 S.C. 197, 207, 727 S.E.2d 751, 757 (Ct. App. 2012) (brackets and internal quotation marks omitted), *cert. granted* August 8, 2013.

The Trial Court accordingly clearly abused its discretion in excluding the evidence of the drug transaction between Paul and Christopher Bell and that being the reason why Christopher Bell and Appellant went to Paul's apartment on the day of the incident because the Trial Court believed its prejudicial effect outweighed its probative value. Appellant is therefore entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Kenneth Jordan Bell respectfully requests this Court to reverse his convictions and remand the case for a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH JORDAN BELL,

APPELLANT.

APPELLATE CASE NO. 2013-001841

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of January, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of January, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021 .

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

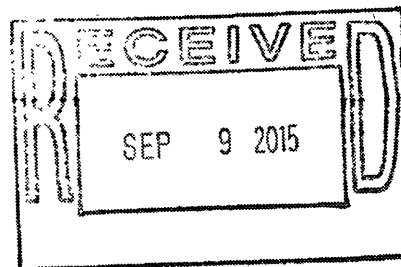
**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Kenneth Jordan Bell, Appellant.

Appellate Case No. 2013-001841



Appeal From Horry County
Roger L. Couch, Circuit Court Judge

Unpublished Opinion No. 2015-UP-447
Submitted May 1, 2015 – Filed September 2, 2015

AFFIRMED

Appellate Defenders Carmen Vaughn Ganjehsani and
Laura Ruth Baer, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Jennifer Ellis Roberts, both of
Columbia; and Solicitor Jimmy A. Richardson, II, of
Conway, for Respondent.

PER CURIAM: Kenneth Jordan Bell appeals his convictions for first-degree burglary, armed robbery, kidnapping, possession of a weapon during a violent

crime, and criminal conspiracy, arguing the trial court erred in (1) incorrectly instructing the jury about the consequences of a mistrial and (2) excluding evidence about a prior drug deal between one of the victims and a co-defendant. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the first issue: *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution."); *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009) ("In reviewing jury charges for error, this [c]ourt must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial."); *id.* ("If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error."); *id.* ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law."); *State v. Singleton*, 319 S.C. 312, 316, 460 S.E.2d 573, 575 (1995) ("The trial [court] has a duty to urge the jury to reach a verdict but [it] may not coerce them."); *id.* at 316, 460 S.E.2d at 575-76 ("It is not coercion when a trial [court] instructs the jury that failure to reach a verdict will require a new trial at additional expense" (footnotes omitted)).

2. As to the second issue: *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("The admission or exclusion of evidence is left to the sound discretion of the trial [court]."); *id.* ("A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant."); *id.* ("Error without prejudice does not warrant reversal.").

AFFIRMED.¹

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

FORM 5

STATE OF SOUTH CAROLINA)
)

COUNTY OF ~~DORCHESTER~~ HORRY SEP 14 AM 9:19)

KENNETH JORDAN BELL 356689)
 Full name and prison number (if any) of Applicant.)

APPLICANT)

v.)

State of South Carolina)

RESPONDANT)

IN THE COURT OF COMMON PLEAS

State Vs. Bell - 2013-GS-26-1335,
 1337, 1339, 1340

APPLICATION FOR

POST-CONVICTION RELIEF

2016 CP26 6088

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 veified (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 chr 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, exeise 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 threes 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 Lieber Correctional Institution
2. Name and location of Court which imposed sentence Horry County Court Of G.S. HORRY COUNTY, MYRTLE BEACH, S.C.
3. Name(s) of co-defendant(s) (if any) Christopher Bell
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2013-GS-26-1335; 1337; 1339 & 1340 Burglary 1st; fifteen years; armed robbery; ten years. criminal conspiracy; five years. possession of a
 - (b) weapon; five years.
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 15, 2013 (see above for specific sentence length).
 - (b) _____

failure to properly investigate

- (a) _____
- (b) _____
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) facts have already been so stated. (see above) _____
- (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? None.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? None.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? None.
- (d) any other petitions, motions or applications in this or any other Court? None.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - N.A.
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - N.A.
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - N.A.
 - i. _____
 - ii. _____
 - iii. _____

- 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?
n.a.

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? yes.
- (b) your trial, if any? yes.
- (c) your sentencing? yes.
- (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? yes.

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 Gregory McCollum, Esq Myrtle Beach, SC
- i. _____
- ii. Carmen V. Ganjehsani, Esq. Appellant Defender Office Of
- iii. Appellate Defense
- (b) the proceedings at which each such attorney represented you:
Pre trial/trial. Direct Appeal w/SC Court of Appeals.
- i. _____
- ii. Applicant reserves as to his legal rights; all his rights as well as his right to amend or revise his APCR application up to the evidentiary-hearing itself.
- iii. _____

19. State clearly the relief you seek in filing this application:
New trial.

20. Are you now under sentence from any other court that you have not challenged?
Applicant is not under any additional sentence(s).

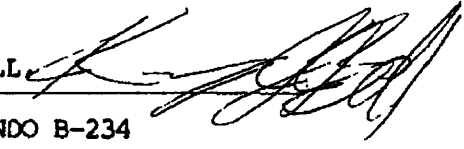
20 16 CP26 6088

STATE OF SOUTH CAROLINA)
)
)

VERIFICATION

KENNETH JORDAN BELL.

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.

KENNETH JORDAN BELL 
Applicant Pro se.

LCI - 356689 - WANDO B-234
136 WILBORN DRIVE. POST OFFICE Box 205
RIDGEVILLE, S.C. 29472-0205

SWORN to and subscribed before me this 6th
day of Sept, 2016.

 (L.S.)
Notary Public

My Commission Expires: 6-20-26

16 SEP 14 WED 5:20
RIDGEVILLE, SC

SOUTH CAROLINA LAW ON POST CONVICTION MATTERS

APPLICABLE LAW

In post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that 'counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.' STRICKLAND V. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674 692 (1984); Butler 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. 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

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. @ 117, 386 S.E.2d @ 625. First, Applicant must prove that counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness" under prevailing norms." (Citing Strickland, 466 U.S. @ 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" Id., @ 117-18, 386 S.E.2d @ 625, with respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have plead guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Pursuant to S.C. Code Ann. § 17.27.80 (2003)

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

KENNETH JORDAN BELL, Applicant

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Handwritten signature of Kenneth Jordan Bell over a horizontal line.

KENNETH JORDAN BELL
LCI - 356689 - WANDO B-234
136 WILBORN DRIVE. P.O. Box 205
RIDGEVILLE, S.C. 29472-0205

SWORN or affirmed to and subscribed before me this 6th day of Sept., 2016.

Handwritten signature of Notary Public over a horizontal line.

My Commission Expires: 6-20-26

NOTE: THIS PRISON JUST TODAY GOT OFF INSTITUTIONAL LOCK DOWN - I COULD NOT HAVE MAILED MY APCR BEFORE THIS DATE DUE TO OUR BEING LOCKED DOWN AND THE HOLIDAY. THANK YOU ALL FOR YOUR INDULGENCE. (KB) 9/6/2016

16 SEP 14 AM 9:20
RECEIVED

KENNETH JORDAN BELL

LCI - 356689 - WANDO B-234
136 WILBORN DRIVE. POST OFFICE BOX 205
RIDGEVILLE, SOUTH CAROLINA 29472-0205

April 20, 2016

CLERK OF COURT
MYRTLE BEACH, SC

2016 CP266088

Re: enlosed APCR for filing and return w/timeclocked verification
request for assignment of counsel

Dear Court Clerk:

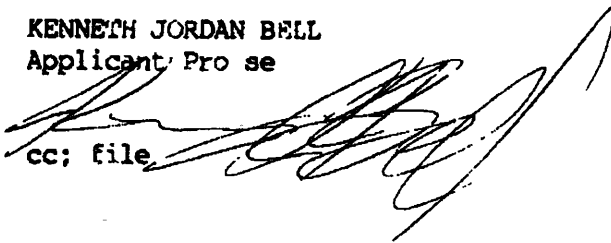
Having respect to the above captioned matter, please find the enclosed
materials including my APCR. Upon your receipt, kindly timeclock and return
for my file and of course, please file my APCR with the Attorney general's
office upon your receipt so we may get the clock running. Thank you.

Should there be anything further, please do not hesitate to contact me and I
will forthwith furnish that information as you may require.

Until such time, I remain,

With kind regards,

KENNETH JORDAN BELL
Applicant Pro se


cc: file

19 SEP 14 AM 5:20
CLERK OF COURT
MYRTLE BEACH, SC

this late stage, the fact I would have insisted upon going to trial had I known it was not in my best interest to plead guilty but rather, to have insisted upon going to trial. please see; Hill v. Lockhart 474 U.S. 52, 59 (1985). Thank you Sir...

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
)	
Kenneth Jordan Bell,)	Case No.: 2016-CP-26-06088
S.C.D.C. No. 356689,)	
)	
Applicant,)	
)	RETURN AND MOTION
v.)	FOR MORE DEFINITE STATEMENT
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

In response to the application for post-conviction relief filed by Kenneth Jordan Bell (Applicant) on September, 14, 2016, Respondent would show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted by the March 2013 term of the Horry County Grand Jury for burglary – 1st degree (2013-GS-26-1335), kidnapping (2013-GS-26-1336), possession of a weapon during the commission of a violent crime (2013-GS-26-1337), armed robbery (2013-GS-26-1339), and criminal conspiracy (2013-GS-26-1340). Applicant was represented at trial by M. Greg McCollum, Esquire. Applicant proceeded to trial on August 12, 2013, and was convicted as indicted of all five charges. Applicant was sentenced on August 15, 2013 by the Honorable Roger L. Couch to imprisonment for concurrent terms of 15 years for burglary – 1st degree, 10 years for armed robbery, 10 years for kidnapping, 5 years for possession of a weapon during the commission of a violent crime, and 5 years for criminal conspiracy

Applicant filed a timely notice of appeal. An appeal was perfected by Carmen V.

Ganjehsani, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed September 2, 2015. State v. Bell, Op. No. 2015-UP-447 (S.C. Ct. App. 2015). The Remittitur was returned on September 28, 2015.

II.

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

1. Ineffective Assistance of Trial Counsel
 - a. "For one instance, counsel failed to protect the trial record when the court gave a charge to the jury in a matter which necessitated an Allen charge."
 - b. "Failure to properly investigate."

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386

S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth sufficient facts to "support each ground" or to explain with any specificity the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Applicant's first allegation of ineffective assistance of counsel is ambiguous, and could be read as a failure to object to the Allen charge given by the Court, as a failure to object to the jury charge in part or in whole, or as some other intended

argument not apparent to Respondent. Applicant's second allegation does not indicate with any specificity what it is that counsel allegedly failed to investigate.

Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCPP; Mangal v. State, Op. No. 27726 (S.C.Sup.Ct. filed July 19, 2017) (Shearouse Adv.Sh. No. 27 at 47). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCPP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCPP.

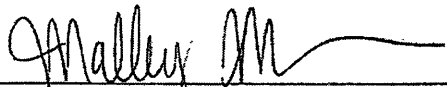
Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	
)	
)	2016-CP-26-6088
KENNETH J. BELL, #356689,)	
)	
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 e-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 and Motion for More Definite Statement** on the above-captioned matter on the following person by e-mail:

Steven W. Fowler, Esquire
1018 Highway 17 South
North Myrtle Beach, SC 29582

DATED this 9th day of August, 2017.



 Mallory Morris, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2016-CP-26-06088

KENNETH JORDAN BELL,)

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA,)

Defendant.)

Transcript of Record

September 18, 2017

B E F O R E:

Honorable William H. Seals
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Steven Fowler, Esquire
Attorney for Plaintiff

Johnny E. James, Jr., Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

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I N D E X

	<u>SEPTEMBER 18, 2017</u>	<u>Pg.</u>
	By the Court	3
	Kenneth Jordan Bell	
	Direct by Fowler	4
	Greg McCollum	
	Direct by James	20
	Cross by Fowler	32
	Redirect by James	40
	Recross by Fowler	41
	Redirect by James	41
	By the Court	42
	Certificate of Court Reporter	44

E X H I B I T S

<u>No.</u>	<u>ID</u>	<u>EV</u>
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(No Exhibits were marked or admitted.)

Bell v State - 2016-CP-26-06088
BY THE COURT

3

1 (SEPTEMBER 18, 2017 - 2:36 P.M.)

2 THE COURT: All right. If the State will call your case.

3 MR. JAMES: Your Honor, the State calls the matter of
4 Kenneth Jordan Bell versus State of South Carolina. It is
5 docket number 2016-CP-26-06088. Mr. Bell is present here in
6 the courtroom today and he is represented by Mr. Steven
7 Fowler. Mr. Bell was convicted on August 15, 2013 for
8 burglary in the first degree, possession of a weapon during
9 the commission of a violent crime, armed robbery, kidnapping,
10 and criminal conspiracy. He was ultimately sentenced to
11 concurrent terms that totaled 15 years. As a procedural
12 matter, Your Honor, upon review of the State's return, it
13 appears that there is a pending return and motion for more
14 definite statement. Your Honor, the State feels comfortable
15 proceeding with the allegations as they presently are and so
16 withdraws that motion for a more definite statement.

17 THE COURT: All right.

18 MR. JAMES: The State's understanding of the allegations
19 are that counsel failed to request an Allen charge when
20 appropriate and failed to properly investigate the case.

21 THE COURT: All right. Mr. Fowler, I'm ready when you
22 are.

23 MR. FOWLER: Your Honor, I'd like to call Mr. Kenneth
24 Jordan Bell to the stand, please. And may his shackles be
25 loosened a little bit so he can bring -- look through his

Bell v State - 2016-CP-26-06088
KENNETH JORDAN BELL - DIRECT BY FOWLER

4

1 notes?

2 THE COURT: He'll take care of that.

3 MR. FOWLER: I'm just approaching to take the documents
4 up to the stand, Your Honor.

5 KENNETH JORDAN BELL, HAVING BEEN DULY
6 SWORN, TESTIFIED AS FOLLOWS:

7 CLERK: Please state your name for the Court.

8 MR. BELL: Kenneth Bell.

9 DIRECT EXAMINATION OF KENNETH JORDAN BELL BY MR. FOWLER:

10 Q: Mr. Bell, you and I have gone over your application; is
11 that correct?

12 A: Yes, sir.

13 Q: We've gone over it both here and through telephone
14 conversation at your incarceration; correct?

15 A: Yes, sir.

16 Q: Okay. You and I have spoken about this and one of the
17 things that you have brought to the attention of the Court
18 through your application is the Allen charge; is that correct?

19 A: Yes, sir.

20 Q: Okay. And basically, the Allen charge in the trial --
21 and just to be sure, the -- there's no -- the trial transcript
22 is part of the record, correct?

23 MR. JAMES: Absolutely.

24 Q: Page 503 to approximately the top of 507 is the part
25 about the -- if I may approach, Your Honor?

1 THE COURT: You may.

2 Q: What I'm showing you here is part of the trial transcript
3 and this is the section on the Allen charge, correct?

4 A: Yes, sir.

5 Q: And this is Page 503 through, once again, 507, correct?

6 A: Yes, sir.

7 Q: Okay. And you and I have gone over this, correct?

8 A: Yes, sir.

9 Q: And you state that one of the issue -- and we won't ask
10 you to read all the pages, but the pertinent part that's --
11 that you and I have discussed is on Page 504, Lines 14 through
12 22, correct?

13 A: Yes, sir.

14 Q: Could you start reading on Line 14 through 22, please?

15 A: If you do not agree on a verdict in this case on one of
16 the charges in this case, it would be my duty to declare what
17 is referred to as a mistrial. In that case, it does not mean
18 that anybody wins. It just means that at some future time
19 either I or some other judge will try this case with some
20 other jury sitting where you're sitting. The same
21 participants will come, perhaps the same lawyers will ask
22 basically the same questions and get basically the same
23 answers and we will then go through this whole process again.

24 Q: Okay. And that was the Judge speaking, correct?

25 A: Yes, sir.

Bell v State - 2016-CP-26-06088
KENNETH JORDAN BELL - DIRECT BY FOWLER

6

1 Q: Okay. Now, I'll leave it up here for a moment. You said
2 that you had some issues with that pronouncement; is that
3 correct?

4 A: Yes, sir.

5 Q: And that's to the -- he was speaking to the jury,
6 correct?

7 A: Yes, sir.

8 Q: What are your issues in terms of that particularly?

9 A: It's from my understanding of the Allen charge, if you --
10 if the jury is hung on one charge, it's got to be unanimous
11 for them to get a verdict. So, if they're hung on one charge,
12 that doesn't mean the whole case is a mistrial if they can't
13 come up with the verdict, it's just that one charge. And I --
14 that was my understanding of that law.

15 Q: So, now, did your attorney go over this with you at any
16 point, the Allen charge?

17 A: No, sir.

18 Q: Okay. Did he go over -- well, so even while it was in
19 court that day, he did not go over it with you, correct?

20 A: No, sir.

21 Q: All right. And on Pages 505 -- your attorney was Mr.
22 McCollum, correct?

23 A: Yes, sir.

24 Q: All right. On Page 505, Line 13, if you could start
25 reading there, that's where your attorney starts speaking; is

1 that correct?

2 A: Yes, sir.

3 Q: Could you read that to the Court, please?

4 A: One point comes to mind, Your Honor. Court: Yes, sir.

5 Ms. McCollum: Mr. Bell is subject to multiple indictments, if
6 the jury reaches verdicts, whether that be guilty of not
7 guilty on all of these -- upon all those indictments with the
8 exception of the one they seem to be referring to, the
9 Defendant be tried again.

10 Q: Okay. And with the Court's indulgence, can we continue
11 to read a little bit because I think it goes on to the next
12 page.

13 A: Okay.

14 Q: Read through 506, Line 22. I don't know where you
15 stopped, but read through 506, Line 22.

16 A: Okay.

17 Q: Pick up where you left off.

18 A: I haven't gone there and that's not really before me to
19 decide. Mr. McCollum: Well, it's just comes to mind in terms
20 of the Allen charge because -- and I understand the Allen
21 charge is well grounded as the appropriate response, but I
22 just raise that.

23 Q: Okay. And we're picking up at Line 1 on Page 506 and
24 read through 22.

25 A: The Court: I haven't reached it -- I haven't researched

Bell v State - 2016-CP-26-06088
KENNETH JORDAN BELL - DIRECT BY FOWLER

8

1 it. I would think that each indictment stands on its own and
2 charges them separate and distinct offenses with different
3 elements. I would not think that double jeopardy would apply
4 if the jury deadlocked and mistrial was declared but I would
5 research that; I don't know. So, that's all I'm raising.

6 Q: Like I said, with the Court's indulgence, read the Line
7 22, please.

8 A: All right. It would seem to me now, if you have some law
9 as to that, I'm glad to take a look at it. Well, it just
10 occurred to me, again, I would think that since each
11 indictment and we charge them at the beginning of the charge
12 that they should decide each indictment separately and
13 distinct from the decision that they made -- that they make in
14 every other indictment, that was the charge that they were
15 given at the beginning of their deliberations. So, they are
16 to weigh each offense separately and the fact that they find
17 someone guilty on one charge should not influence their
18 decision in deciding the other charges.

19 Q: And then, finally, Mr. McCollum on Line 22.

20 A: Maybe it's more of a practical consideration.

21 Q: So, if it -- the Court gave your attorney the opportunity
22 to provide case law on this Allen charge, correct?

23 A: Yes.

24 Q: All right. He did not do that, right?

25 A: No.

1 Q: Okay. In regards to this section of the transcript, you
2 state that you have -- just to go over one more time, you feel
3 like the Court incorrectly charged the jury, correct?

4 A: Yes.

5 Q: And your attorney, in what you just read, Page 505 to
6 Line 22 on 506, what's your thoughts on that -- I mean, what's
7 your -- I don't want to lead you, but what are your thoughts
8 on Mr. McCollum's response to that Allen charge?

9 A: So, as though he didn't argue enough because I feel as
10 the jury left for deliberations confusing and misunderstanding
11 what the actual Allen charge was.

12 Q: So, you're saying that Mr. -- in your opinion, are you
13 saying Mr. McCollum did not do a proper job in terms of -- in
14 terms of what, in terms of correcting the Court, in terms of
15 objecting or what specifically should he have done better, do
16 you think?

17 A: I feel like he should have objected and corrected the
18 Court on the record.

19 Q: Okay. Did he ever file any kind of brief to this issue?

20 A: No, sir.

21 Q: Okay. Did he ever ask you anything about following up
22 with it or any particular work that he did on the Allen charge
23 that you say was good work on this?

24 A: No, sir.

25 Q: Now, you're not an attorney, correct?

Bell v State - 2016-CP-26-06088
KENNETH JORDAN BELL - DIRECT BY FOWLER

10

- 1 A: No, sir.
- 2 Q: But you are -- but you have studied this since that court
3 date, correct?
- 4 A: Yes, sir.
- 5 Q: How have you studied -- what have you done to find out
6 about the Allen charge?
- 7 A: I went to the law library when -- when times were
8 available throughout this past year.
- 9 Q: So, what kind of studying did you do on this one?
- 10 A: Case laws and just similar cases to my nature.
- 11 Q: All right. So, based on your research after this trial
12 date, you feel like -- how would you describe your attorney's
13 performance on the Allen charge?
- 14 A: Deficient.
- 15 Q: Do you think because of that deficiency you're where you
16 are now?
- 17 A: Yes, sir.
- 18 Q: Now, in terms of your relationship, professional
19 relationship with your attorney, did he provide any kind of --
20 are you familiar with the term discovery?
- 21 A: Yes, sir.
- 22 Q: And what is it, in your own words?
- 23 A: It's the evidence that's gonna be used against you before
24 your trial.
- 25 Q: Did you ever get any discovery from him?

1 A: No, sir.

2 Q: Okay. So, did he ever go over -- did he ever provide you
3 the documentation that the State had that they were going to
4 use against you at trial?

5 A: He never provided documentation, no.

6 Q: Did he meet with you frequently or how did he meet with
7 you before trial?

8 A: I went out of state for when I was on bond, and every
9 time I would come down for a like a roll call or whatever I
10 would check, I would come see him or try to call him.
11 Sometimes he was out of the office, sometimes he would see me.

12 Q: Did you meet with him frequently?

13 A: No.

14 Q: Okay. How many times do you think you met with him?

15 A: Maybe about four.

16 Q: Okay. Were those long visits?

17 A: Thirty minutes to an hour.

18 Q: Okay. What did you go over at those meetings?

19 A: Basically, what happened during the incident and what I
20 think I should do, should I take it to trial, and stuff like
21 that.

22 Q: But the Allen charge is a -- is a specific point of law;
23 is that correct?

24 A: Yes, sir.

25 Q: And that came up during the trial, correct?

Bell v State - 2016-CP-26-06088
KENNETH JORDAN BELL - DIRECT BY FOWLER

12

- 1 A: Yes, sir.
- 2 Q: It wasn't something that you two could've gone over
3 beforehand necessarily, was it?
- 4 A: No, sir.
- 5 Q: So, at the point the Allen -- the Allen charge came up,
6 once again you're saying that -- let me rephrase that. Did he
7 -- he didn't work with you any on the Allen charge, correct?
- 8 A: No, sir.
- 9 Q: Now, did you have a question about -- how long was he
10 retained before -- did you -- was he a public defender that
11 you went through the Court for or the Clerk's office, or was
12 he a privately retained attorney?
- 13 A: Privately retained attorney.
- 14 Q: And how far before the trial did you and he -- were you
15 -- was he retained by you?
- 16 A: I'd say probably about five months, four months,
17 somewhere around there.
- 18 Q: So, did he give you the opportunity to continue the trial
19 or did he say, well, five months is not enough time or what
20 was -- do you think five -- in retrospect, do you think five
21 months was enough time for you two to go over everything that
22 you needed to go ---
- 23 A: No.
- 24 Q: Would you repeat that, please?
- 25 A: No, I do not. I don't think it was enough time.

1 Q: Do you feel like he was rushed into -- he rushed into
2 trial or do you think the Solicitor's office did that or how
3 did the trial -- okay, if you retained an attorney and five
4 months later you're meeting for a trial, did you and he talk
5 about that at all or what?

6 A: I was detained on February 2nd and I believe not too long
7 after I retained Mr. McCollum and then August we were in court
8 for my trial, so everything went really quick. I believe the
9 Solicitor pushed it, but I don't remember any arguing from my
10 defense.

11 Q: Do you feel like in retrospect you should've had more
12 time to prepare for trial?

13 A: Yes, sir.

14 Q: Why is that?

15 A: It's my life. I mean, I don't think you should rush into
16 anything when your freedom and your life is on the line.

17 Q: In terms of calling witnesses to the stand during the
18 trial, were you pleased with Mr. McCollum's performance?

19 MR. JAMES: Objection, that was not an allegation that
20 was raised in the application and therefore is not before this
21 Court for review.

22 MR. FOWLER: Well, it says ineffective assistance by
23 trial counsel and it goes into one instance. So, I mean, it's
24 a fairly broad ranging ineffective assistance by trial
25 counsel.

Bell v State - 2016-CP-26-06088
KENNETH JORDAN BELL - DIRECT BY FOWLER

14

1 THE COURT: Yeah, I'm gonna overrule it.
2 Go ahead and ask the question.
3 BY MR. FOWLER:
4 Q: Could you go ahead and answer the question?
5 A: I was not pleased with it, no.
6 Q: Okay. Why not?
7 A: Because he called one of my brothers to the stand and he
8 had nothing to do with it. He had no idea what was going on
9 and he was getting asked questions by the State that he
10 shouldn't have had to answer.
11 Q: Okay. So, you feel like that was an ineffective witness
12 for you?
13 A: Yes, sir.
14 Q: Okay. And do you think that perhaps caused problems for
15 you in trial?
16 A: Yes, sir.
17 Q: Okay. All right. Going along with that line of
18 questioning, you stated that there was some issue factually in
19 terms of gun casings or gun shells that were found that were
20 not owned by you or something; is that correct?
21 A: Yes, sir.
22 Q: Tell me a little bit about that.
23 A: It was part of the evidence, it was a black case and it
24 was -- this -- in my transcript it was listed with a computer
25 cord in it, and the jury took it in the back room for

1 deliberate, I guess they wanted to look at it.

2 Q: And repeat, what was this again, a ---

3 A: A black case.

4 Q: Are you talking about -- when you say case, are you
5 talking about a shell casing or a case itself or what
6 specifically ---

7 A: It was a black zip-up case. They thought it was a
8 computer case.

9 Q: Okay.

10 A: But as they were looking for -- the reason they thought
11 it was a computer case is because there was a computer cord in
12 it.

13 Q: Okay.

14 A: But when they were looking at it, a nine millimeter shell
15 fell out which didn't match the gun in this incident.

16 Q: Now, when did this shell fall out?

17 A: During -- when the jury had it for deliberation.

18 MR. JAMES: Objection, again this isn't irrelevant to the
19 claims that were raised in the application.

20 THE COURT: I understand. Overruled. Go ahead.

21 BY MR. FOWLER:

22 Q: Okay. So, you're saying that apparently a shell casing
23 fell out while the jury was looking at it, correct?

24 A: Yes, sir.

25 Q: Okay. And how does that relate to his ineffective

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1 assistance of counsel?

2 A: He didn't even argue about the case. He didn't say
3 nothing about the case, he just let it -- just let them say
4 that the case was mine. I didn't have a case, I didn't walk
5 out of there with anything.

6 Q: Okay. Okay. So, you're saying there was -- just to
7 clarify, there was a disconnect about that case with the shell
8 casing in it ---

9 A: Yes.

10 Q: And whose ownership that was, correct?

11 A: Yes.

12 Q: And your attorney didn't object to that?

13 A: Exactly.

14 Q: All right. As you've stated on your application, it was
15 an ineffective assistance by trial counsel. Is there anything
16 else you feel like fits under that umbrella in terms of
17 ineffective assistance by your attorney?

18 A: Yes. I felt like he failed to ask for a lesser charge
19 because in my tran -- during my trial at the very end when the
20 victims were getting asked ---

21 MR. JAMES: Object for the record, because this issue was
22 not raised in the application.

23 THE COURT: I understand. Go ahead. Overruled.

24 BY MR. FOWLER:

25 Q: Go ahead.

1 A: The victim was asked would they like to make statements
2 at the end of my trial. All -- I believe all three of my
3 victims stood up and asked for lesser sentences. And I
4 believe it was Eric Meyer who said, I wish he would've taken
5 the deal, he would've been out in two, two years. I never
6 received a two-year plea, I never knew anything about a two-
7 year plea or a two-year deal, whatever. So, I felt like he
8 was ineffective because I'd never been offered what this
9 victim knew and I don't know how he knew and I didn't.

10 Q: Okay. If I may approach, Your Honor.

11 A: You may.

12 Q: So, are you referring to basically Pages 521 and 522 of
13 the transcript?

14 A: Yes, sir.

15 Q: All right. And with the Court's indulgence, I'd like for
16 you to read Lines 22 through 25 on 521 and then down to Line 7
17 on 522.

18 A: This is Mr. Meyer, I as well would like to state my
19 condolences. I wouldn't wish -- I would ask for -- I would
20 ask for your leniency. He already -- he's already suffering
21 way more charges than the minimum would have, would have been
22 if he had taken that -- and at the same time I had thought
23 about reacting, there was a chamber in bullet, so I feel bad,
24 but I definitely do not want him to have maximum sentences. I
25 mean, if I had responded, I could have accidentally been shot so

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1 it's not like this is something that could be overlooked, but
2 please at least give him leniency. I wish he had taken the
3 deal. He'd have been out in two years.

4 Q: Okay. So, who was Mr. Meyer again?

5 A: He's one of the victims in the case.

6 Q: And you're saying -- according to this transcript, he had
7 some apparent knowledge about your -- about a deal that you
8 could've taken; is that correct?

9 A: Yes, sir.

10 Q: Was that -- and the deal was -- and to quote, Line 6 and
11 7, I wish he had taken the deal, he'd have been out in two
12 years. What did you know about what Mr. Meyer was talking
13 about?

14 A: I had know nothing.

15 Q: Was a plea ever provided to you by your attorney?

16 A: The only plea -- the only plea that I was offered was a
17 -- violent for armed robbery and I was advised not to take it.

18 Q: So, how -- when you heard Mr. Meyers say this on the
19 transcript in court that day, what was your reaction?

20 A: I was shocked. I literally wanted to stand up in court
21 and say, what, I've never been offered that. I believe my
22 family members actually did stand up and say what was going on
23 with that.

24 Q: All right. Okay. All right. And just -- like I said,
25 under the -- anything else that comes to mind on this case?

1 A: Not at this moment, no.

2 Q: Okay. I have no further questions, Your Honor.

3 THE COURT: All right.

4 Cross?

5 MR. JAMES: I have no questions for this witness, Your
6 Honor.

7 THE COURT: You may step down. Thank you.

8 Call your next witness.

9 MR. FOWLER: If I may speak to my client for a moment,
10 Your Honor?

11 THE COURT: You may.

12 MR. FOWLER: If I may have just a moment, Your Honor?

13 THE COURT: You may.

14 MR. FOWLER: Your Honor, that's the only witness that we
15 have.

16 THE COURT: All right.

17 MR. FOWLER: And that's our case.

18 THE COURT: Thank you.

19 The State is recognized. Call your first witness.

20 MR. JAMES: All right. The State will call Mr. McCollum.

21 GREG MCCOLLUM, HAVING BEEN DULY

22 SWORN, TESTIFIED AS FOLLOWS:

23 CLERK: State your name. Okay?

24 MR. MCCOLLUM: Hi. My name is Greg McCollum; McCollum,
25 M-C-C-O-L-L-U-M.

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GREG MCCOLLUM - DIRECT BY JAMES

20

1 DIRECT EXAMINATION OF GREG MCCOLLUM BY MR. JAMES:

2 Q: Good afternoon, Mr. McCollum. I'm sorry to keep you
3 waiting all day.

4 A: Thank you.

5 Q: Sometimes we just get the short end of the stick on the
6 roster order.

7 How long have you been practicing law?

8 A: Since 1988.

9 Q: How much of that is criminal law?

10 A: Probably 90 percent of it or more.

11 Q: Were you appointed or retained to represent Mr. Bell?

12 A: I was retained.

13 Q: About how many times did you meet with Mr. Bell in the
14 course of your representation?

15 A: I don't recall how many times I met with him. He said --
16 he testified that -- I would expect him to have a much better
17 memory of that, that -- I do remember he was out on bond and
18 had gone back home which was -- I can't remember the exact
19 state but it was some distance away. He said that he had met
20 with me three or four times for 30 minutes to an hour, so I
21 would think that was probably accurate.

22 Q: During those meetings, did you discuss the indictments,
23 the offenses, and their elements with your client?

24 A: You know, obviously I don't have an exact recollection of
25 that but that would be the normal course of what we would do

1 is lay out the evidence, go through the evidence, explain the
2 challenges, the problems, the risks, and things like that.

3 Q: Okay. And going on that, in the normal course would have
4 reviewed the possible punishments?

5 A: Oh, yeah, certainly. And, in this case, the most
6 difficult punishment was the -- was the mandatory minimum
7 sentence for the burglary first degree. And then, of course,
8 then the armed robbery with the mandatory minimum sentence of
9 10 years, and both of those being no parole. Those were the,
10 the two large ones. And then, you know, I think there was an
11 indictment in there for using a firearm during a violent crime
12 which carries, I think, five years also, I think, without
13 parole. So, so, he was looking at some really tough charges
14 in terms of mandatory minimums.

15 Q: Did you explain to him all of his constitutional rights?

16 A: Yes.

17 Q: Jury, right to silence, confrontation, and call
18 witnesses?

19 A: Yes.

20 Q: All right. Did you explain to him the State's burden to
21 prove the case beyond a reasonable doubt?

22 A: Yeah. We typically -- there again, I don't remember
23 specifically and explaining that to him, but we -- usually
24 when you're representing somebody, especially a case that's
25 going to trial or just pleading for that matter, that's

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1 usually something that's gone over multiple times.

2 Q: Did he appear to understand everything that you told him?

3 A: Yes. I didn't have any reason to think he didn't know
4 what we were talking about.

5 Q: What sort of discussions did you have with your client
6 with respect to proceeding to a jury trial and trying to get a
7 guilty plea?

8 A: The problem that he had was that they had a lot evidence
9 and the -- most of his case was really mitigation and we were
10 not successful in getting the solicitor, the assistant
11 solicitor to really pay attention or listen to us. So, the
12 brunt of it was that he had a plea offer of 10 years, which
13 would've been to the armed robbery charge, where he if pled
14 guilty get the 10 years and do eight-and-a-half years. That
15 was the -- that was as good as it ever got. And those were
16 the discussions we had and whether to take that or go forward.
17 The thought being that if we got, you know, a lesser included
18 or something on an armed robbery, that we could conceivably do
19 no worse than that -- excuse me -- on the burglary first. But
20 it was -- his case should've been a plea but the problem was
21 the best plea offer was the 10 years without parole.

22 Q: And you explained all the terms of that plea offer to
23 your client?

24 A: Yeah. You know, he -- you know, the prosecutor just
25 really dug in on it and the -- what I recall about it was that

1 her final negotiation with us was that she -- I think she
2 believed the evidence indicated that Mr. Bell had the firearm
3 and she just wouldn't back off of the substantive charges
4 because she perceived him as the person who had wielded the
5 weapon. At the time that he was arrested, he had been in --
6 he had been in the -- I can't remember the branch, but he was
7 in the armed forces. And he was in basic training and was
8 succeeding and ---

9 MR. FOWLER: Your Honor, I would like to object to the
10 relevance of this answer.

11 MR. JAMES: I have no problem with this objection.

12 THE COURT: Sustained.

13 BY MR. JAMES:

14 Q: What was your client's -- obviously, your client turned
15 down that plea offer, correct?

16 A: Yes.

17 Q: Did he do so with your counsel? Did you agree with that
18 decision?

19 A: Yeah -- you know, that's a very tough decision to make,
20 you know, to willingly go to prison for eight-and-a-half years
21 when you're as young as he was with no criminal history. But
22 ultimately, the decision was made to go to trial. Was that a
23 good decision or bad decision? Obviously, he got five years
24 longer than he would've gotten had he taken the plea, so it's
25 bad in that regard, but I usually -- certainly, at that time,

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1 I don't really force my clients to plead guilty because I've
2 found that many times, some good things can happen to people
3 who were deserving of it, and he was somebody that I thought
4 should've really gotten a better deal.

5 Q: What if anything did Mr. Bell tell you about what
6 happened?

7 A: You know, he -- it basically came down to his brother had
8 some kind of physical handicap and his brother was going to go
9 and try to get money that was owed to him by somebody from the
10 prior -- basically, a drug transaction. And both his brother
11 and the girlfriend of the brother, I think she was, they
12 really kind of shamed him into going with them and helping him
13 because his brother had that physical deformity. So, he was
14 torn between, you know, not doing something really foolish and
15 criminal and deserting his brother, and that was basically
16 what had happened, that he should not have gone but he felt
17 like he would be deserting his brother if he didn't go assist.

18 Q: There weren't really any leads to pursuing this case, the
19 facts were straightforward, were they not?

20 A: They were worse than straightforward. During the home
21 invasion, one of the occupants of the apartment was in the
22 bedroom and was on the phone with 911 going through all the
23 details of the home invasion as it occurred. That was all on
24 the 911 tape. The police arrived before Mr. Bell and his
25 brother came out of the building. So, they had car videos on

1 the patrol car or cameras and so even coming out of the
2 building was video and audio taped.

3 Q: So, the case against Mr. Bell was in one word
4 overwhelming?

5 MR. FOWLER: Objection, Your Honor, leading.

6 THE COURT: Sustained. Why don't you rephrase it?

7 BY MR. JAMES:

8 Q: Let me ask a follow-up question or a different question.
9 How would you describe the strengths -- the strength of the
10 State's case against your client?

11 A: It's very rare that you have somebody explain the crime
12 to 911 as its occurring and then have police on scene before
13 someone is able to leave and then video tape and audio tape
14 that.

15 Q: And did you explain the strengths and weaknesses of this
16 case to your client?

17 A: Yeah, we went over that. It was just -- you know, that
18 10-year plea offer was just -- if we'd had a better plea
19 offer, I think that we would've resolved the case. And if it
20 had been -- if we'd have gotten a 10-year plea offer where he
21 would've been parole eligible, he's somebody, based on his
22 character, his -- everything he'd done in his life up to that
23 point was good, I think that if he'd have gotten a 10-year
24 parole eligible offer, then honestly, you know, I think he
25 would've taken that. He might could've done that as a

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1 youthful offender and I think he would've been paroled. He
2 would've been one of those people that gets paroled the first
3 time.

4 Q: Ultimately, y'all proceeded to trial. How did you go
5 about executing your strategy at trial?

6 A: The -- you know, the trial strategy, I was reading the
7 transcript, we went from having really almost no visible
8 defense to arguing that he was only there assisting his
9 brother who was owed this debt, whether it legal or illegal.
10 We tried to get into the evidence that the debt was from a
11 drug deal but the Judge allowed us to put in that it was a
12 debt but not from a drug transaction and that -- you know,
13 that's the only thing that happened. That's the only thing
14 that was taken from the scene and that's what we argued that
15 there were, you know, flat screen T.V.s in there and
16 valuables, the people had wallets and possessions, and that
17 Kenneth didn't do anything to take anything from anybody, he
18 was really just there in assisting his brother.

19 Q: Did this trial, this strategy exist before you went to
20 trial, did you plan it out ahead of time or did it sort of
21 develop in the course of the trial?

22 A: I don't -- I can't remember the specifics of how it came
23 together, but that was the trial strategy which it played
24 really fairly well with the jury. They were out, you know,
25 they had to get the Allen charge and they deliberated for, I

1 think it was over three-and-a-half hours.

2 Q: Since we've touched on it now, we'll skip ahead to the
3 Allen charge. Did you -- did you feel that that Allen charge
4 was unduly coercive or confusing?

5 A: I think the -- you know, according to the transcript, we
6 raised that and said that, you know, it's improper to tell the
7 jury that the case will have to be tried again because if you
8 have multiple indictments and they're having trouble -- let's
9 say that they're -- let's say they're hanging up on the
10 burglary first charge and that's a hung jury, then the whole
11 case would not be retried. It's maybe possible to retry him
12 on the burglary first. Legally, I thought there was a big
13 question as to whether you could present the exact same facts
14 again if he'd been convicted of some of the indictments. I
15 think that's -- I think that's a valid issue, but in real
16 terms, the Solicitor was never gonna try that case again if he
17 got convicted of one or more of those felonies.

18 Q: But you raised that on that issue on the record?

19 A: Yeah, we raised the objection to the Allen charge in the
20 way I just described it. I did not cite specific law, I did
21 not prepare a memo, I didn't ask for a recess to do more legal
22 research, and so in that sense, I did not do any of those
23 things.

24 Q: Did you -- because this occurred while the jury was out
25 deliberating. Did you seek to perform any -- were you able to

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1 perform any research while you were there in the courtroom?

2 A: I don't remember whether I did or not but clearly it
3 wouldn't matter because there's nothing in the record stating
4 that we had presented, you know, citations or legal arguments
5 in terms of specific cases.

6 Q: Mr. McCollum, let's take a step back to before trial.
7 What sort of efforts did you undertake to investigate this
8 case?

9 A: The -- you know, we talked to Kenneth and his family. I
10 found out a lot of good things about him. I found out why he
11 was living here, what the circumstances were and talked to his
12 family members about, you know, their ability to testify on
13 his behalf, showing that his -- the allegations here were
14 completely inconsistent with his character and good behavior
15 up to that point.

16 Q: And, of course, in your representation, did you file a
17 request for discovery pursuant to Rule 5 and Brady?

18 A: Yes.

19 Q: And did the State provide materials in response to your
20 request?

21 A: Yes.

22 Q: Did you review those materials?

23 A: Yes. I -- you know, again, I don't have a specific
24 memory of doing that, but yes we would always view the
25 evidence and look at the evidence.

1 Q: With your client?

2 A: In that case, typically, what we did on cases is once we
3 got the discovery, we would make a physical copy of it and
4 send it to the client, especially if the client lived
5 somewhere else. In terms of DVDs and discs and that sort of
6 thing, normally, I would think we would do that. You know,
7 over the last five years, six years, ten, or whatever the time
8 period is, you know, the production of evidence has changed
9 very much. You know, and we certainly try to keep up with
10 that. It's changed a lot since his trial. Now, we have I
11 think a client portal where we can put video and photos and
12 stuff like that. In the past, the Solicitor's office would,
13 you know, they'd give us a black-and-white Xerox of photocopy,
14 you know, of 40 or 50 photographs, you know, that's not
15 helpful or useful. So, to the extent that we had things like
16 that, you know, we would typically provide it.

17 Q: Did you explain any of those materials to him?

18 A: Yeah. We would go over it with him, certainly.

19 Q: Did you feel that you had enough time to prepare for this
20 case?

21 A: Yes. You know, it -- the legal issues were fairly
22 straightforward. The evidence was what it was. It -- the
23 only thing really in this case was if he had time to view the
24 evidence and see what it is. And that's, in my mind, five
25 months is plenty of time to prepare.

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1 Q: Mr. Bell raised an issue that you failed to object or
2 express any concern to the Court when the jury discovered a
3 shell casing in the black bag that was introduced as an
4 exhibit and went back to the jury with deliberations. Should
5 you have objected or made a motion for a mistrial on the basis
6 of that shell casing?

7 A: I mean, maybe so. I can't remember the context of that.
8 I think that all arguments, all jury instructions were
9 finished. I think maybe -- I can't remember how that came up
10 but I -- maybe there was a note from the jury, maybe we
11 discussed it with the judge, maybe it was off the record, it
12 should've been on the record. Perhaps I should've moved for a
13 mistrial, certainly, it never hurts to do that.

14 Q: Were you concerned or alarmed when one of the victims
15 indicated in his statements to the Court that the Applicant
16 had previously received an offer to plea in which he would, as
17 a practical matter serve only two years in prison?

18 A: The -- not really. His case was odd because the jury
19 came back in and they were in tears while he was being
20 sentenced. The Judge was trying to find -- the judge clearly
21 knew he had to give him the max, I mean, those mandatory
22 minimums. The victims in the case were crying because they
23 thought he shouldn't have been punished so severely. As far
24 as the statement that he would've been out in two years, I
25 just took that to mean that the -- that particular witness did

1 not understand the plea negotiations and didn't know what the
2 sentences actually are. I mean, he -- if they had offered him
3 10 years without parole, well, I would've -- we probably
4 would've taken that because, like I said before, I think he'd
5 have been paroled because he got -- I mean, for who he is --
6 I've represented thousands of people probably and he is
7 somebody that -- a young person who was improving his life, it
8 was just this medical thing that caused him not to be in the
9 armed forces right at that very moment. He came here and was
10 trying to protect his brother who was -- just dragged him down
11 into this terrible mess. If he hadn't been here, he'd
12 probably be, you know, honorably discharged or serving in the
13 military right now. He was a really good kid who just
14 happened to be dragged into this thing.

15 Q: But there's no question that he was there?

16 A: Where?

17 MR. FOWLER: Objection, Your Honor, relevance. I mean,
18 we've gone over this case and, I mean, it's been asked and
19 answered.

20 MR. JAMES: I think the strength of the State's case ---

21 THE COURT: Overruled. Go ahead.

22 BY MR. JAMES:

23 Q: There's no question that Mr. Bell was there at the
24 apartment?

25 A: All the evidence, all the witnesses testified he was

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1 there and the police officers arrested him the parking lot.

2 Q: All right. I have no further questions.

3 THE COURT: All right. Cross?

4 CROSS EXAMINATION OF GREG MCCOLLUM BY MR. FOWLER:

5 Q: So, in your pretrial discussions with my client, you
6 didn't go over the Allen charge, the term Allen charge, did
7 you?

8 A: Before the trial started?

9 Q: Right.

10 A: No.

11 Q: That's something that came up during the trial, correct?

12 A: Yes.

13 Q: And that's kind of a specialized, in my words, term of
14 art or term of legal art that you wouldn't normally go over
15 with before the trial, correct? I mean, it's case specific,
16 correct?

17 A: No, I wouldn't because, you know, first of all you have
18 to get a hung jury for it to even arise and what I find is,
19 you know, the more you explain to clients about what may or
20 may not happen, the more confused they get and tend not to
21 understand it. So, it's better in my opinion to deal with it
22 when it arises if it's something that's likely not going to
23 arise.

24 Q: Okay. But it did come up and you've been in the
25 courtroom -- you were in the courtroom earlier when we read

1 into the record Pages 504 through roughly 507, correct?

2 A: Yes. And I read it along on the transcript copy that I
3 have as you were -- as the testimony was being presented.

4 Q: So, when that came up, what discussions did you have at
5 that time with my client about what a Allen charge is?

6 A: I don't think I had any with him. I'd say to answer your
7 question, none.

8 Q: But at that point it was something that was relevant to
9 his case, correct?

10 A: Yes.

11 Q: Now, he read into the -- my client read into the record
12 Page 504, Lines 14 through 22, what the Judge charged the
13 Court and he also went over what you discussed with the Court
14 on Page 505 through the top of 507. So, you didn't object to
15 what the Judge said. I think in your -- on Page 505, Line 13,
16 I think you said, one point comes to mind, Your Honor --
17 that's not an objection is it?

18 A: I would not describe that as an objection, no.

19 Q: Okay. And then my client read on 505 and '6 and '7, and,
20 you know, today on the witness stand on direct examination
21 that it was improper for the Judge to tell the jury that my
22 client would be tried again. So, what do you mean by that?

23 A: It seemed like the issue on the Allen charge was that the
24 Allen charge would make the jury think that if they didn't
25 reach a verdict on all counts that the whole case would have

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1 to be tried again. That's the way I took it to understand, so
2 that was not -- that's not accurate.

3 Q: But that's what the Judge told the jury, correct?

4 A: Yeah, I think that's what -- I think that's the meaning
5 that the jury would infer from that charge, yes.

6 Q: Now, also in the transcript, I think the Court, if I may,
7 on Page 506 -- if I may approach the witness, Your Honor?

8 THE COURT: You may.

9 Q: Lines 8 through 10, if you could read that, please, Page
10 506, Lines 8 through 10.

11 A: The Court: All right. It would seem to me now if you
12 have some law as to that, I'll be glad to take a look at it.
13 Line 11, Mr. McCollum: Well, it's just occurred to me.

14 Q: Okay. So, the Court -- if I may -- so, the Court gave
15 you the opportunity to provide some case law in this matter,
16 correct?

17 A: Yes.

18 Q: Okay. Did you take the opportunity to provide case law
19 in this matter to the Court?

20 A: No.

21 Q: Okay. So, based on my cross examination so far, what you
22 said -- and even the direct, you didn't provide the case law
23 to the -- you thought that the Judge made an incorrect charge
24 to the jury or incorrect statement to the jury and yet you
25 didn't provide any case law on that alleged incorrect

1 statement; is that correct?

2 A: That's correct.

3 Q: Okay. Now, you mentioned on direct examination that a
4 hung jury -- and just kind of help me out here, I'll clarify
5 what you said earlier, you said a hung jury, the whole case
6 would not be retried. So, is -- the Allen charge and a hung
7 jury, are they different things or the same or -- explain to
8 me your mentioning earlier that a hung jury, the whole case
9 would not be retried.

10 A: If, as Mr. Bell was on trial, if a person is on trial for
11 multiple indictments and the jury cannot reach a verdict on
12 one or more of those but reaches verdicts on the others, then
13 certainly, the guilty counts would not be subject to retrial.

14 Q: And you also said earlier that you felt like the
15 Solicitor would never try that case again; is that correct?

16 A: If Mr. Bell had been convicted of, say, kidnapping and
17 having a weapon during a violent crime and acquitted of a,
18 say, armed robbery and burglary in the first degree, no, no.
19 Based on his lack of criminal history and having tried the
20 case extensively, I can't know the answer to that but I don't
21 think that that would be -- I don't think they would spend the
22 time and energy to retry him given the fact that he would've
23 been convicted and sentenced of felonies arising out of the
24 acts for which he was on trial.

25 Q: Okay. In a case like this -- you mentioned earlier on

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GREG MCCOLLUM - CROSS BY FOWLER

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1 direct examination that you provided no memorandum to the
2 Court, which we've just gone over, you asked for no recess to
3 review this. In a case like this where the Judge apparently
4 may've mis-instructed the jury what are some options that are
5 available to a lawyer? Are they to take a recess, are they to
6 ask for a continuation to the next day, what are some
7 opportunities that are available to you as a criminal defense
8 attorney to potentially correct what the Judge had sent to the
9 jury?

10 A: The -- it depends on what resources you have available.
11 Okay? If you have the ability to do, you know, electronic
12 research in the courtroom as we have now, certainly that can
13 be done, not extensively, but some search could be done. If
14 you have, you know, law clerks or associates of other members
15 of the bar that are part of the defense team, then it's likely
16 that those people could be dispatched to look some things up.
17 Finally, you could ask for a recess, but it's unlikely in my
18 opinion that a judge is going to allow you to take a recess
19 with a jury deliberating at the end of the case. So, it's
20 more of what resources that you have at your disposal when it
21 comes up.

22 Q: But as to that final point, he did offer you the chance
23 to provide some law on that topic, correct?

24 A: Yeah. And if I had had the law, you know, at my
25 fingertips, I certainly would've provided it to him. I didn't

1 take anything from his comments that he was going to let me
2 take two days off or a day off or five hours off and start,
3 you know, researching that one issue in a fairly, you know,
4 extensive trial.

5 Q: But you did follow up with a question to the Judge to
6 clarify what he would allow you to do; is that correct?

7 A: That's correct.

8 Q: And you've been practicing law, criminal law since 1988.
9 So, some of those resources are available to you, correct?
10 You have associates?

11 A: At that time, no.

12 Q: But you had some kind of legal case -- some kind of --
13 you had the opportunity to do some research at your law firm,
14 correct?

15 A: Well, most of the research would need to be done ahead of
16 the trial and I -- okay? That would be done in anticipation
17 of it. But certainly, you know, the -- most judges -- let me
18 say this, all Circuit Court Judges have an extensive knowledge
19 of an Allen charge and the idea that I'm going to spring
20 something on Judge Couch is really not that likely.

21 Q: But once again, he gave you the opportunity to do so,
22 correct?

23 A: Yeah, I agree with that.

24 Q: All right. You mentioned that you went over the
25 discovery with my client. Did you ever mail him the hard

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1 copies of this or any kind of DVD or anything along those
2 lines? Did you not only -- did you provide a copy of what the
3 Solicitor's office gave to you to him?

4 A: I don't know if we did or we didn't. I think that he had
5 testified that we did not. That would violate our policy for
6 our office because all of that stuff should be sent to him
7 without me even saying so. Just as a matter of course when we
8 receive it, he should get a copy of it.

9 Q: Do you have any kind of record stating that you sent it
10 to him?

11 A: I don't have that here today, no, so, if -- in answer to
12 your question, it is possible that we did not send it.

13 Q: Now, in terms of the questioning by the Attorney General
14 in terms about the shell casing in the black bag, what's your
15 recollection of that situation? I think my client on direct
16 exam said something to the effect of a black bag was taken
17 back to the jury room and shell casing fell out. I believe
18 that's the correct analysis or summary of what he said.
19 What's your recollection of that event?

20 A: First of all, I think my recollection of that is
21 incomplete. I think what happened was that something fell out
22 of the bag that no one knew was in there and that the jurors
23 raised it -- that to the Court and I think we had a conference
24 with the Court as to what to do or not to do and that's all I
25 can remember about it.

1 Q: And what was that conference in the trial transcript or
2 was that on the record or off the record?

3 A: It must've been off the record if it's not in the
4 transcript.

5 Q: Okay. So, but having a shell casing fall out of a
6 computer bag, that's a fairly big deal, isn't it, I mean
7 especially in the jury room, correct?

8 A: I'd say, you know, it's certainly significant, yes. At
9 the same time, had the State known it was in there, they
10 would've introduced it as evidence and emphasized it.

11 Q: Okay. When something like that happens, and I think
12 you've mentioned this on direct examination, you could've
13 moved for a mistrial, correct?

14 A: Yes.

15 Q: And why in that scenario could you have moved for a
16 mistrial?

17 A: You could say that the appearance of a, you know, live
18 ammunition round, which is the same or similar to the gun used
19 in the case is certainly relevant. It's incriminating and
20 that the fact that the State did not, you know, properly
21 examine the bag -- because we wouldn't have had the ability to
22 look in the bag, you know, until we get to Court basically and
23 so the responsibility would be on the State to know what was
24 in the bag and then it would be evidence that would not have
25 been disclosed to us that could've been found by the State

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GREG MCCOLLUM - REDIRECT BY JAMES

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1 through due diligence, so that would be motion for the
2 mistrial.

3 Q: And you didn't file for a mistrial upon finding that out,
4 did you?

5 A: I don't -- if it's not in the transcript, I would say
6 that I did not.

7 MR. FOWLER: Okay. If I may have a moment.

8 No further questions, Your Honor. After conferring with
9 my client, no further questions, Your Honor.

10 THE COURT: All right.

11 Cross?

12 REDIRECT EXAMINATION OF GREG MCCOLLUM BY MR. JAMES:

13 Q: You indicated that you couldn't do research in the
14 courtroom at the time, correct?

15 A: I don't think that I could, no.

16 Q: You didn't have a laptop or anything like that?

17 A: You know, I don't have a perfect memory of this, but four
18 years ago, I don't know that we were -- had the capability to
19 do the research right here in the courtroom.

20 MR. JAMES: I have no further questions, Your Honor.

21 THE COURT: Anything further?

22 RECROSS EXAMINATION OF GREG MCCOLLUM BY MR. FOWLER:

23 Q: Just to follow up on that, to be clear, the Judge did not
24 give you a time limit, as you read into the record, he
25 basically said, if I may -- if you have some law as to that,

1 I'll be glad to take a look at it. So, there was no time
2 limit imposed on you to do that research, correct?

3 A: Correct.

4 Q: And you didn't ask for any kind of clarification on a
5 time limit to do that research, correct?

6 A: Correct.

7 Q: Was your -- did you have an assistant there with you that
8 day? Cathy, perhaps? Does that name ring a bell?

9 A: I may -- I probably did, a legal assistant, non-lawyer,
10 secretary, yes.

11 Q: So, that's -- so, even with a reasonable time limit, you
12 could've asked your assistant to do some research, you know,
13 within an hour or so, correct?

14 A: I could have.

15 MR. FOWLER: No further questions, Your Honor.

16 REDIRECT EXAMINATION OF GREG MCCOLLUM BY MR. JAMES:

17 Q: I hate to re-redirect, but you indicated that your legal
18 assistant has no legal training?

19 A: Correct.

20 Q: Does she have any paralegal training?

21 A: I can't remember. I don't think so.

22 Q: Would it have been unusual for the Court to permit you to
23 leave during deliberations?

24 MR. FOWLER: Objection, Your Honor. That's not anywhere
25 in our line of questioning. It's not in the transcript and

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BY THE COURT

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1 we're -- that would be an assumption of what the Judge
2 would've ---

3 THE COURT: Sustained.

4 MR. JAMES: If I may, Your Honor, just to put the
5 argument on the record, the entire line of questioning as to
6 this issue is that he didn't do research as to the issue
7 before the Court as to the Allen charge which then implies
8 that he should've gone out and done the research, so ---

9 THE COURT: Right. He doesn't know that the Judge would
10 do.

11 MR. JAMES: Okay. No further questions.

12 BY THE COURT:

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

14 MR. MCCOLLUM: Thank you, Judge.

15 THE COURT: All right. Any other witnesses?

16 MR. JAMES: No, Your Honor.

17 THE COURT: All right. I'll take it under advisement and
18 let you know something.

19 MR. FOWLER: Are we gonna have closing arguments, Your
20 Honor, or ---

21 THE COURT: You can if you'd like. I think I've heard
22 enough, but if you want to close, go ahead.

23 MR. FOWLER: Well, I don't want to try the patience of
24 the Court, Your Honor.

25 THE COURT: I'm patient; I've just heard it all and I

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BY THE COURT

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1 know ---

2 MR. FOWLER: Well, we just wanted -- those issues that
3 have been raised today, we think meet the standard of
4 *Strickland*.

5 THE COURT: Okay. Thank you.

6 MR. FOWLER: And we'd ask for a verdict in our favor.

7 THE COURT: All right. Thank you.

8 MR. JAMES: I will similarly offer a two-sentence
9 argument.

10 THE COURT: Yeah, I don't need it. Call your next case.

11 MR. JAMES: All right.

12 THE COURT: Thank you. Good to see you, Mr. McCollum.

13 MR. MCCOLLUM: Good to see you, too.

14 THE COURT: Yes, sir. Have a good day.

15 (ADJOURNED - 3:37 P.M.)

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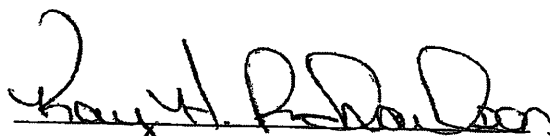
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25C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Kenneth Jordan Bell versus State of South Carolina, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on September 18, 2017.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson

Official Court Reporter

February 26, 2018.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
 COUNTY OF HORRY)
 Kenneth Jordan Bell,) Case No.: 2016-CP-26-06088
 S.C.D.C. No. 356689,)
)
 Applicant,)
) **ORDER OF DISMISSAL**
 v.)
)
 State of South Carolina,)
)
 Respondent.)

FILED
 CLERK OF COURT
 HORRY COUNTY
 SOUTH CAROLINA
 SEP 19 2017

This matter comes before the Court by way of an application for post-conviction relief filed by Kenneth Jordan Bell (“Applicant”) on September 14, 2016. Respondent made its return on or about August 9, 2017. The Court convened an evidentiary hearing into the matter on September 18, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Johnny E. James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s trial counsel, M. Greg McCollum, Esquire (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant’s direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the March 2013 term of the Horry County Grand Jury for burglary, first degree (2013-GS-26-01335), kidnapping

(2013-GS-26-01336), possession of a weapon during the commission of a violent crime (2013-GS-26-01337), armed robbery (2013-GS-26-01339), and criminal conspiracy (2013-GS-26-01340). M. Greg McCollum, Esq., represented Applicant, and Nancy Livesay, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial on August 12, 2013, before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on August 15, 2013. Judge Couch sentenced Applicant to imprisonment for concurrent terms of 15 years for burglary, 10 years for armed robbery, 10 years for kidnapping, 5 years for the weapon, and 5 years for conspiracy.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Carmen V. Ganjehsani, Esq., who raised two issues:

1. The Trial Court erred in instructing the jury that if the jury failed to reach a verdict on one of the charges against [Applicant], a mistrial would be declared, the case would be retried, and the parties would "go through this whole process again;" the Trial Court erred by not clarifying that the jury's failure to reach a verdict on any one indictment would necessitate a new trial on that particular indictment, not a new trial of the entire case.
2. The Trial Court erred in excluding evidence that one of the alleged victims and a co-defendant had entered into a previous drug transaction for which the alleged victim owed the co-defendant money and that the reason the co-defendant and [Applicant] went to the alleged victim's apartment was to collect money for this drug debt; the evidence was relevant and admissible because (1) it was part of the *res gestae* of the alleged crime; (2) it had bearing on the [Applicant's] intent in going to the alleged victim's apartment and whether [Applicant] had the required *mens rea* for the charges against him; and (3) it showed bias on the part of the alleged victim for which [Applicant] was entitled to confront him with on cross-examination. Furthermore, the probative value of this evidence was not substantially outweighed by any prejudicial effect to the State's case and to the alleged victim, especially where the Trial Court had already allowed the jury to hear that the alleged victim had previously been convicted of drug charges.

Final Brief of Appellant at 3. By unpublished opinion decided September 2, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Bell, Op. No. 2015-UP-447 (S.C. Ct. App. 2015). The Remittitur was issued on September 28, 2015.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:¹

- I. "Ineffective assistance by trial counsel;"
 - a. "for one instance, counsel failed to [appropriately] protect the trial record when the court gave a charge to the jury in a matter which necessitated an Allen Charge."
 - b. "failure to properly investigate"

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

¹ Additionally, Applicant testified at the evidentiary hearing to two allegations neither raised in his application nor amended into his application at any stage of the proceedings: (1) Counsel was ineffective for failing to move for a mistrial after a cartridge was found in a black folio in evidence after it was sent to the jury for deliberations, and (2) Counsel was ineffective for failing to object to erroneous statements by a victim that a plea offer of two years was at some point offered to Applicant.

The Court finds that these allegations are not properly before the Court for consideration. In most PCR cases, there is no justification to excuse the pleading requirements that apply in all civil cases. Mangal v. State, Op. No. 27726 (S.C. Sup. Ct. refiled October 4, 2017) (Shearouse Adv.Sh. No. 38 at 12, 20). While the interests of justice may, on rare occasion, require flexibility in the pleading requirements set forth in the rules of civil procedure, given the overwhelming evidence against Applicant sufficient to foreclose a finding of prejudice, the Court can find no reason to excuse the pleading requirements. See Id., (quoting Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016)). Accordingly, the Court declines to consider these allegations.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). “Moreover, no prejudice occurs, despite trial counsel’s deficient performance, where there is otherwise overwhelming evidence of the defendant’s guilt.” Id., 386 S.C. at 566, 689 S.E.2d at 631.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

IAC Allegation #1 – Failure to Object to Allen Charge

Applicant alleges trial counsel was ineffective by failing to timely object and preserve for appeal the issue of whether the Allen² charge delivered by the Court was so confusing as to be constitutionally defective. "The trial judge has a duty to urge the jury to reach a verdict, but he may not coerce it." State v. Pauling, 332 S.C. 95, 99, 470 S.E.2d 106, 108-09 (1996). "Whether an Allen charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)).

At trial, upon inquiry by the jury about what happens in the event of a deadlock, the Court drew them back to the courtroom and delivered the following Allen charge:

² Allen v. U.S., 164 U.S. 492 (1896).

Now, ladies and gentlemen, you've stated to me that you've been unable to reach a verdict as to one of the charges in this case and as I instructed you earlier, *a verdict in any of the charges must be unanimous*. I'll tell you that when a matter is in dispute, it isn't always easy for even two people to agree. So when twelve people must agree, it becomes even more difficult to reach agreements. In most cases, absolute certainty cannot be reached or even expected. However, you have a duty to make every reasonable effort to reach a unanimous verdict. In doing this, you should consult with one another, express your own views and listen to the opinions and views of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss the differences you have with open minds. Although the verdict of the Jury must be unanimous, every one of you has a right to follow your own opinion. The verdict you agree to must be your own verdict in the final analysis. The result of your own convictions and you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. I would ask that the majority should consider the minority's position. I would also ask the minority to consider and reflect upon the majority's opinion or position. You should carefully consider and respect the opinions of each other and re-evaluate your position for reasonableness, correctness and impartiality. You should lay aside all outside matters and re-examine the questions before you based upon the law and the evidence presented in this case.

If you do not agree on a verdict in this case, *on one of the charges in that case*, it would be my duty to declare what is referred to as a mistrial. In that case, it does not mean that anybody wins; it just means that at some future time either I or some other judge will try this case with some other jury sitting where you now sit. The same participants will come, perhaps the same lawyers will ask basically the same questions and get basically the same answers and we will then go through this whole process again.

Now, you were selected in the same manner and from the same source as any future jury in this case would be chosen and there's no reason for me to believe or suppose that the case will ever be submitted to twelve more intelligent or impartial or conscientious or competent jurors than you, or that any more clearer evidence will be produced by one side or the other. So, what I'm going to ask you to do is return to your deliberations. Consider what I've just said to you and again re-examine the positions in light of my charge in this matter. So I'm gonna ask you to return to the jury room and continue your deliberations. Thank you very much.

Tr. 503-05 (emphasis added). The jury returned to deliberations and, upon prompt from the Court, Counsel raised the question of whether the charge was confusing in light of the multiple indictments:

Mr. Bell is subject to multiple indictments. If the Jury reaches verdicts, whether they be guilty or not guilty, on all those indictments with the exception of the one they seem to be referring to, could the Defendant be tried again?

Tr. 505, ll. 16-19. After further discussion, the Court concluded the totality of its instructions to the jury clearly indicated that each indictment should be decided separately and it did not further instruct the jury. Tr. 506-07.

At the evidentiary hearing, Applicant argued the Allen charge was confusing to the point of being prejudicial. Counsel testified he raised the issue of the Allen charge to the Court, but further admitted he could have sought a mistrial. On cross-examination, Counsel testified that he did not review any Allen charge before trial, did not discuss the concept with Applicant before trial, and did not object—Counsel did not consider the conversation with the Court an objection.

The Court finds that Counsel's conversation with the Court did operate as an objection and that Applicant has demonstrated neither any deficiency on the part of counsel nor any prejudice therefrom. Applicant explicitly raised on appeal the question of the Allen charge's validity and the South Carolina Court of Appeals affirmed the conviction on the merits. As the Court of Appeals has already determined that the charge was valid as a matter of law, and did not reject the appeal for want of adequate preservation, this Court cannot find any deficiency on the part of Counsel in protecting the record. Counsel's recollection of how his objection was framed is of no concern where the appellate courts have already clearly proceeded upon the issue as properly preserved. Accordingly, this Court finds no deficiency on the part of Counsel, and Applicant's request for relief by way of this allegation is **DENIED**.

IAC Allegation #2 – Failure to Investigate and Prepare

Applicant alleges that Counsel failed to adequately investigate his case and prepare for trial. The scope of a reasonable investigation depends upon a number of issues, but “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quotation omitted). “Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

At the evidentiary hearing, Applicant testified to his belief that Counsel did not have enough time to prepare after he was retained, and that Counsel should have sought more time to prepare for trial. Counsel testified that he had enough time to prepare for trial. Counsel indicated that most of his case was oriented toward mitigation. When pressed on cross-examination about conducting research on the Allen charge in the courtroom, Counsel testified he lacked the capacity to in-court research at the time of trial of the like and kind now possible, and he did not have any associates or assistants to whom he could have assigned a rapid research task. Counsel could not recall if discovery materials were sent to Applicant and indicated he did not keep any records to indicate as much, but that failure to do so would violate the standard practices and policy of his office.

The Court finds that Counsel’s testimony and the trial record demonstrate Counsel adequately investigated Applicant’s case and was prepared for trial. The underlying facts of Applicant’s conviction are straightforward and overwhelming—after breaking into an apartment

and holding its occupants against their will by gunpoint, Applicant was immediately captured outside, matching the descriptions provided by the victims, and in possession of materials stolen from the residence. Counsel's advocacy at trial in opposition to the State's motion to suppress evidence of prior drug dealings between the victim and a co-defendant shows his thorough preparation and investigation of the victim's backgrounds for the purposes of determining the best trial strategy. Tr. 34-42. Counsel wisely executed a strategy of mitigation in the face of evidence against his client that was impossible to overcome. Furthermore, in light of the overwhelming evidence, Applicant cannot demonstrate prejudice. See Smith, 386 S.C. at 566, 689 S.E.2d at 631. Accordingly, the Court finds no deficiency or prejudice on the part of Counsel, and Applicant's request for relief by way of this allegation is **DENIED**.

III. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 6 day of Nov., 2017.



WILLIAM H. SEALS JR.
Presiding Judge
Fifteenth Judicial Circuit

Marion, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF Horry)

Kenneth Jordan Bell, #356689)
 Plaintiff)

v.)

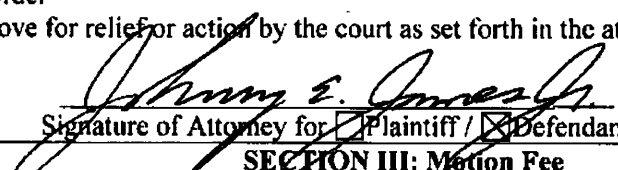
State Of South Carolina)
 Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-266088

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
NOV 13 PM 3:00
COURT CLERK
Horry County

Plaintiff's Attorney: Steven W. Fowler, Bar No. 69683 Address: 1019 Hwy 17 South N. Myrtle Beach, SC 29582 phone: fax: e-mail: other:	Defendant's Attorney: Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	November 1, 2017 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

627

WITNESSES

B Odom Horry County Police Department

C

DOCKET NO. 2013-GS-26-01335

**The State of South Carolina
County of Horry**

Nancy Livesay

13H00620

COURT OF GENERAL SESSIONS

MARCH, 2013 TERM

ARREST WARRANT NUMBER

M976811

CDR: 0079 16-11-0311

DOA: 2/3/2013

THE STATE

vs.

ACTION OF GRAND JURY

Kenneth Jordan Bell

W/M

Myrtle Beach, SC 29575

DOB: [REDACTED]

SSN: [REDACTED]

ATTORNEY: Mullins, Randall K.

Foreperson of Grand Jury

Date: *[Signature]* 2013

VERDICT

GUILTY

Indictment for

BURGLARY, FIRST DEGREE

Jimmy A. Richardson, II, Solicitor

Michelle A. Ramo

Foreperson of Petit Jury

Date: 8/15/13

ORIGINAL

WITNESSES

B Odom Horry County Police Department

ARREST WARRANT NUMBER

M976813

CDR: 0095 16-03-0910

DOA: 2/3/2013

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: *[Signature]*

VERDICT

Guilty

Michele A. Ramm

Foreperson of Petit Jury

Date: *8/15/13*

DOCKET NO. 2013-GS-28- 01336

C

The State of South Carolina

County of Horry

Nancy Livesay

13H00620

COURT OF GENERAL SESSIONS

MARCH, 2013 TERM

THE STATE

vs.

Kenneth Jordan Bell
W/ M



ATTORNEY: Mullins, Randall K.

Indictment for

KIDNAPPING

Jimmy A. Richardson, II, Solicitor

ORIGINAL

631

WITNESSES

B Odom Horry County Police Department

DOCKET NO. 2013-GS-26-01337

**The State of South Carolina
County of Horry**

Nancy Livesay

13H00620

COURT OF GENERAL SESSIONS

MARCH, 2013 TERM

ARREST WARRANT NUMBER

M976827

CDR: 0549 16-23-0490

DOA: 2/3/2013

THE STATE

vs.

Kenneth Jordan Bell

W/ M

Myrtle Beach, SC 29575

DOB: [REDACTED]

SSN: [REDACTED]

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: [Signature]

VERDICT

Guilty

ATTORNEY: Mullins, Randall K.

Indictment for

**POSSESSION OF A WEAPON DURING THE
COMMISSION OF A VIOLENT CRIME**

Jimmy A. Richardson, II, Solicitor

Foreperson of Petit Jury
Date: 8/15/13

ORIGINAL

633

WITNESSES

B Odom Horry County Police Department

DOCKET NO. 2013-GS-26- 01339

**The State of South Carolina
County of Horry**

Nancy Livesay

13H00820

COURT OF GENERAL SESSIONS

MARCH, 2013 TERM

ARREST WARRANT NUMBER

2013GS2601339

CDR: 0139 16-11-0330(A)

DOA: 2/3/2013

THE STATE

vs.

Kenneth Jordan Bell

W/ M

Myrtle Beach, SC 29575

DOB: [REDACTED]

SSN: [REDACTED]

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 8/13

VERDICT

Guilty

ATTORNEY: Mullins, Randall K.

Indictment for

ARMED ROBBERY

Michelle A. Ramon

Jimmy A. Richardson, II, Solicitor

Foreperson of Petit Jury

Date: 8/15/13

ORIGINAL

635

WITNESSES

B Odom Horry County Police Department

DOCKET NO. 2013-GS-26- 01340

**The State of South Carolina
County of Horry**

Nancy Livesay

13H00620

COURT OF GENERAL SESSIONS

MARCH, 2013 TERM

ARREST WARRANT NUMBER

2013GS2601340

CDR: 0049 16-17-0410

DOA: 2/3/2013

THE STATE

vs.

ACTION OF GRAND JURY

Kenneth Jordan Bell

W/ M

Myrtle Beach, SC 29575

DOB: [REDACTED]

SSN: [REDACTED]

ATTORNEY: Mullins, Randall K.

Foreperson of Grand Jury

Date: *[Signature]*

VERDICT

Guilty

Indictment for

CRIMINAL CONSPIRACY

Michelle Orr Bennett

Jimmy A. Richardson, II, Solicitor

Foreperson of Petit Jury

Date: *8/15/13*

ORIGINAL

