STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
R. KNOX McMAHON, CIRCUIT COURT JUDGE

THE STATE,

RESPONDENT,

V.

PERRY B. BUCHANAN,

APPELLANTT.

PRO-SE ANDERS BRIEF OF APPELLANTT

PERRY B. BUCHANAN
WRCI. CORR. INST.
P.O.BOX 189
REMBERT, S.C. 29128

APPELLANT PRO-SE

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(4) WAS THE TRIAL COURT IN ERROR IN SUBMITTING AN UNCONSTITUTIONAL CHARGE ON THE LAW OF STRONG ARMED ROBBERY?

STAEMENT OF THE CASE

APPELLANT PERRY B. BUCHANAN WAS INDICTED BY THE LEXINGTON COUNTY GRAND JURY ON JUNE 7, 2010 FOR ARMED ROBBERY, AND POSS OF A WEAPON DURING THE COMMISSION OF A VIOLLENT CRIME. R.4,LINES 4-9; R.226. APPELLANTS CASE PROCEEDED TO TRIAL BEFORE THE HON. R. KNOX McMAHON, AND A JURY. APPELLANT WAS REPRESENTED BY CASEY CORNWELL (COUNSEL), WHILE THE STATE WAS REPRESENTED BY J. ANGELA GARRICK AND COLLEEN E. DICKSON. R.1.

THE JURY FOUND APPELLANT GUILTY OF THE LESSER INCLUDED OFFENSE OF STRONG ARMED ROBBERY, AND ACQUITTED APPELLANT OF THE OFFENSE OF POSS. OF A WEAPON DURING THE COMMISION OF A VIOLENT CRIME. R. 204, LINE 21-R. 205, LINE 12. THE TRIAL COURT SENTENCED APPELLANT TO A TERM OF FIFTEEN YEARS CONFINEMENT. R. 217, LINES 13-17; R. 228.

A POST-TRIAL MOTIONS HEARING WAS ALSO HELD ON SEPTEMBER 22, 2011, BASED UPON APPELLANTS MOTION TO RECONSIDER SENTENCE. HOWEVER, APPELLANT WITHDREW THE MOTION AT THE HEARING. R. 220.

STATEMENT OF THE FACTS

APPELLANT WAS RIDING AS A PASSENGER IN A NISSAN XTERRA ON JARVIS KLAPMAN BOULEVARD WHEN THE VEHICLE WAS STOPPED BY THE POLICE AT APPROXIMATELY 4:40 PM. TO 5:00PM. ON MARCH 12, 2010, FOR SUSPICION OF "SHOPLIFTING" FROM A NEAR WALMART.

ARGUMENT

(1) APPELLANT CONTENDS THAT THE TRIAL COURT WAS IN ERROR FOR ALLOWING HIM TO BE CONVICTED OF THE LESSER- INCLUDED OFFENSE OF ARMED ROBBERY.

APPELLANT SUBMITS TO THIS COURT THAT THE EVIDENCE THAT WAS PRESENTED TO THE JURY WAS INSUFFICIENT AND THAT THE COURT ERRED.

ON DIRECT EXAMINATION OF MS. SHIRLEY THE RECORD WILL REFLECT THE FOLLOWING:

(ON TR. P. 65, LINE 17-P. 66, LINE 5)

Q. OKAY. YOU SAY, "I'M NOT GOING TO TOUCH YOU, I'M NOT GOING TO TOUCH YOUR BUGGY, SHOW ME YOUR RECEIPT."

WHAT HAPPENS THEN?

A. WELL, THEN HE TRIES TO GET AROUND ME AND I WOULD STEP BACK IN FRONT OF THE CART MAKING SURE I DIDN'T TOUCH EITHTER ONE AND IT WAS LIKE GOING AROUND AND, YOU KNOW, I WOULD STEP BACK IN FRONT OF HIM.

Q. OKAY, AT SOME POINT DID HE SAY ANYTHING ELSE?

A. WHEN HE SAW THAT I WASN'T RELINQUISHING, HE REACHED DOWN--- HE REACHED OUT, IT LOOKED LIKE HIS JACKET, AND HE PULLED OUT A YELLOW BOX CUTTER AND HE BROUGHT IT OUT.

APPELLANT SUBMITS TO THE COURT THAT THE TESTIMONY OF THIS WITNESS AS WELL AS OTHER EVIDENCE OF THE APPELLANT BEING ARMED WITH A DEADLY WEAPON WAS DELIBERATED BY THE JURY AFTER IT WAS CHARGED BY

THE COURT. THEREFORE, THIS ELEMENT OF THE OFFENSE WAS A QUESTION FOR THE JURY.

APPELLANT WOULD RESPECTFULLY DIRECT THE COURTS ATTENTION TO A RECHARGE ON THE LAW CONCERNING THE APPELLANT BEING ARMED WITH A DEADLY WEAPON, AND THE JURY VERDICTS.

ON TR. P. 201, LINES 14-15, THE RECORD WILL REFLECT THE FOLLOWING

THE FOREMAN: WE WOULD LIKE CLARIFICATION ON SOMETHING.

ON TR.P. 202, LINE 11-P. 204, LINE 6, THE RECORD WILL REFLECT THE FOLLOWING:

THE COURT: THEY JUST WANT CLARIFICATION ON POSSESSION OF A WEAPON DURING THE CRIME. "DOES THAT MEAN THE WEAPON USED OR NOT? INTENT OF USE OR JUST ON PERSON?"

THE COURT: I'M JUST GOING TO RECHARGE THEM THAT PART OF MY CHARGE

MS. GARRICK: YES, SIR.

THE COURT: ALL RIGHT. YOU CAN BRING THEM IN.

THE COURT: ALL RIGHT. I BELIEVE BEFORE YOU TAKE YOUR BREAK I'M GOING TO RECHARGE YOU ON JUST THIS ONE SECTION. THERES A STATUTE IN SOUTH CAROLINA ENTITLED POSSESSION OF A WEAPON DURING THE COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME UNDER SECTION 16-23-490. THE DEFENDANT IS CHARGED WITH POSSESSION OF A WEAPON DURING THE COMMISSION OF OR ATTEMPT TO COMMIT A VIOLENT CRIME. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THE DEFENDANT VISIBLY DISPLAYED A KNIFE DURING THE COMMISSION OF A VIOLENT CRIME.

Armed robbery is a violent crime.

THE COURT: ALL RIGHT. ANY EXCEPTIONS?

MS. GARRICK: NO, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. CORNWELL: NO, YOUR HONOR.

THE COURT: ALL RIGHT. WE'LL BE AWAITING THE JURIES RETURN AND VERDICTS.

AFTERWARDS, THE JURY CAME INTO OPEN COURT WITH THEIR VERDICTS.

STATEMENT OF THE FACTS

THECLERK: MR. FOREMAN, HAVE YOU REACHED YOUR VERDICT?

THE FOREMAN: YES, WE HAVE.

THE CLERK: INDICTMENT NO. 2010-GS-32-1522, STATE VERSUS PERRY BUCHANAN, AS TO ARMED ROBBERY: WE, THE JURY, BY UNANIMOUS CONSENT FIND THE DEFENDANT GUILTY OF ROBBERY.

INDICTMENT NO. 2010-GS-32-1523, AS TO POSS. OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME: WE, THE JURY, BY UNANIMOUS CONSENT FIND THE DEFENDANT NOT GUILTY.

APPELLANT SUBMITS THAT THE QUESTION WAS PRESENTED TO THE JURY ON THE POSS. OF A WEAPON ELEMENT; THAT THEY DELIBERATED AFTER A RECHARGE ON THE LAW AND THEIR VERDICT RINGS CLEAR AS A BELL THAT THEY DISBELIEVED THAT THE APPELLANT WAS ARMED WITH A WEAPON. FURTHER, THERE IS NO EVIDENCE IN THE RECORD, NOR SUBMITTED TO THE JURY THAT THE APPELLANT CARRIED OUT A STRONG ARMED ROBBERY. THERE WAS NO EVIDENCE THAT THE APPELLANT CARRIED OUT THIS "SHOPLIFTING" BY MEANS OF FORCE, THREATS OR INTIMIDATION TO MS. SHIRLEY SMITH AS STATED IN THE INDICTMENT FOR ARMED ROBBERY.

IT IS THE APPELLANTS POSITION THAT ONCE THE JURY ACQUITTED HIM OF THE INDICTED OFFENSE OF ARMED ROBBERY, IT WAS AN ERROR OF LAW FOR THE COURT TO ALLOW A CONVICTION FOR STRONG ARMED ROBBERY WHEN THOSE ELEMENTS WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

ARGUMENT

(2) WAS THE TRIAL COURT IN ERROR FOR NOT SUBMITTING A CHARGE ON "SHOPLIFTING?"

PETITIONER SUBMITS THAT DURING THE TRIAL, BOTH THE SOLICITOR AND DEFENSE COUNSEL STATED THAT THE PETITIONER COULD HAVE COMMITTED SHOPLIFTING ONLY IN WHICH CREATED A JURY QUESTION ON THAT OFFENSE. YET, THE COURT FAILED TO CHARGE "SHOPLIFTING" TO THE JURY.

ON TR. P.50, LINE 13.-P.51, LINE 3 REFLECTS THE FOLLOWING: MS. DIXON: LADIES AND GENTLEMEN, SOMETIMES ONE DETAIL CAN CHANGE THE WHOLE PICTURE. IS IT SUNNY OUTSIDE OR IS IT RAINING? IS SOMEONE SMILING OR ARE THEY CRYING? IS THEIR HAND EMPTY OR IS IT HOLDING A WEAPON?

THE STATE WILL PROVE TODAY, LADIES AND GENTLEMEN, THAT ON MARCH 12, 2012, THAT THE DEFENDANT, MR. BUCHANAN, WENT INTO THE WALMART IN WEST COLUMBIA AND HE TOOK A COMPUTER, DIDN"T PAY FOR IT AND ATTEMPTED TO WALK OUT OF THE STORE.

ONE OF WALMART EMPLOYEES THAT WILL BE TESTIFYING BEFORE YOU TODAY, MS. SMITH, TRIED TO STOP THE DEFENDANT. "I NEED TO SEE YOUR RECEIPT." HE DIDN'T HAVE A RECEIPT TO SHOW HER.

MS. SMITH IS GOING TO TELL YOU AT THAT POINT THE DEFENDANT PULLED OUT A BOX CUTTER AND HE THREATENED HER WITH THAT BOX CUTTER SHE BACKED OFF. THE POLICE WERE CALLED.

IT IS THE APPELLANTS POSITION THAT WHEN THE JURY ACQUITTED HIM OF ARMED ROBBERY AND POSS. OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME, THOSE ELEMENTS WHICH INCLUDE "BEING ARMED WITH A DEADLY WEAPON" AS WELL AS "BY MEANS OF FORCE, INTIMIDATION OR FEAR," WERE NEGATED. FURTHERMORE, THERE WAS NO EVIDENCE OF THE LATTER ELEMENTS.

LATER ON IN CLOSING ARGUMENTS THE SOLICITOR MS. GARRICK MAKES THE FOLLOWING COMMENTS TO THE JURY.

(ON TR. P.181, LINE 19-P.182, LINE 9).

MS. GARRICK: MS. DIXON TOLD YOU AT THE BEGINNING OF THIS CASE THAT A DETAIL CAN CHANGE THE PICTURE, AND THAT'S TRUE. "IF MR. BUCHANAN HAD JUST GONE INTO WALMART AND CONCEALED SOME CLOTHING OR ITEMS OR EVEN TRIED TO JUST SNEAK OUT WITH THAT COMPUTER, IT WOULD HAVE BEEN SHOPLIFTING. IF HE HAD TRIED TO GET OUT WITH THE COMPUTER IN THAT BUGGY BY JUST INTIMIDATING MS. SHIRLEY OR PUSHING PAST HER IN THE BUGGY USING FORCE OR INTIMIDATION, THAT WOULD BE STRONG ARMED ROBBERY, LADIES AND GENTLEMEN.

BUT WHEN HE PRESENTED THIS THAT HE TOLD DET. WADE HE HAD IN HIS HAND, WHEN HE PRESENTED A BOX CUTTER, THAT CHANGED THE PICTURE. THAT MADE THE CRIME ARMED ROBBERY. IT MADE HIM IN POSS. OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME.

APPELLANT, AGAIN, SUBMITS THAT HE WAS ACQUITTED OF BOTH OFFENSES BECAUSE THE JURY DISBELIEVED THE TESTIMONY THAT HE WAS ARMED AND THAT HE CARRIED OUT A SHOPLIFTING BY MEANS OF FORCE, INTIMIDATION OR FEAR AND THAT AS FAR AS ANY OF THE ABOVE ELEMENTS BEING PROVED BEYOND A REASONABLE DOUBT--THE RECORD SPEAKS FOR ITSELF AND IT IS CRYSTAL CLEAR THAT THIS WAS A CRIME OF "SHOPLIFTING."

(3) WAS THE COURT IN ERROR IN DENYING APPELLANTS MOTION FOR A DIRECTED VERDICT DUE TO INSUFFICIENT EVIDENCE?

ON TR P.138, LINE 16-P.139, LINE 4, THE RECORD WILL REFLECT:

THE COURT: ALL RIGHT. YOU HAVE MOTIONS, MR. CORNWELL?

MR. CORNWELL: YOUR HONOR, I WOULD MAKE A MOTION FOR A SUMMARY JUDGEMENT AT THIS TIME. YOUR HONOR, THE STATE HAS PRESENTED NO EVIDENCE BY WHICH A REASONABLE JURY CAN FIND MY CLIENT GUILTY. I'D ASK FOR A DIRECTED VERDICT, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU. VIEWING THE EVIDENCE IN LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY FOR THE EXISTENCE AND NOT THE WEIGHT OF THE EVIDENCE, I FIND THERE IS SUBSTANTIAL DIRECT AND SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE FROM WHICH A JURY COULD RETURN A VERDICT OF GUILTY ON BOTH COUNTS. DEFENDANT'S MOTION FOR DIRECTED VERDICT IS DENIED.

PETITIONER SUBMITS TO THIS COURT THAT THIS IS AN ERROR IN LAW AND A "CLEAR EROR" ON THE TRIAL COURT. THERE WAS NOT ANY SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE PROVEN BEYOND A REASONABLE DOUBT AT TRIAL THAT THE PETITIONER COMMITTED A "STRONG ARMED ROBBERY" PETITIONER FURTHER SUBMITS THAT THE ONLY THING PROVEN BEYOND A REASONABLE DOUBT WAS "SHOPLIFTING."

IN RE WINSHIP, 397, U.S. 358, 364, 90 S.CT. 1068, 1073 (1970). THE DUE PROCESS CLAUSE PROTECTS THE ACCUSED A CONVICTION EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED.

APPELLANT SUBMITS TO THIS COURT THAT THE STATE FAILED IN THIS REGARD. A REVIEW OF RECORD WILL REVEAL THAT THE STATE DID

NOT PROVE EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE WAS TRIED FOR, NOR DID THE STATE PROVE THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED. AS A RESULT IT IS THE APPELLANTS POSITION THAT THE STATE UNCONSTITUTIONALLY CONVICTED HIM OF THE WRONG OFFENSE. UNFORTUNATELY, THE JURY WAS NOT GIVEN THE LAW ON SHOPLIFTING AND THEREFORE, THE JURY WAS NOT GIVEN THE OPPORTUNITY TO CONVICT HIM OF THE CORRECT OFFENSE.

IT IS THE APPELLANTS POSITION THAT WHEN THE STATE RELIES EXCLUSIVELY ON CIRCUMSTANTIAL EVIDENCE AND MOTION FOR A DIRECTED VERDICT IS MADE, THE CIRCUIT COURT IS CONCERNED WITH THE EXISTENCE OR NONEXISTENCE OF EVIDENCE, NOT WITH ITS WEIGHT. THE COURT SHOULD NOT REFUSE TO GRANT THE DIRECTED VERDICT MOTION WHEN THE EVIDENCE MERELY RAISES A SUSPICION THAT THE ACCUSED IS GUILTY. "SUSPICION" IMPLIES A BELIEF OR OPINION AS TO GUILT BASED UPON FACTS OR CIRCUMSTANCES WHICH DO NOT AMOUNT TO PROOF. STATE V. CHERRY, SUPRA; STATE V. HORNE, 324 S.C. 372, 478 S.E. sd 289 (Ct. App. 1996)

A REITERATION OF THE PREVIOUS ARGUMENTS, APPELLANT IS ENTITLED TO RELIEF FROM THIS CONVICTION. THE STATE HAS FAILED TO PROVE THE ELEMENTS OF STRONG ARMED ROBBERY. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE CRIME. IT IS THE APPELLANTS POSITION THAT THE COURT ERRED IN NOT DIRECTING A VERDICT. THE JURIES VERDICTS OF ACQUITTAL IS A TESTIMONY TO THAT FACT. THE DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

(4) WAS THE TRIAL COURT IN ERROR IN SUBMITTING AN UNCONSTITUTIONAL CHARGE ON THE LAW OF STRONG ARMED ROBBERY?

ON TR. P.194, LINE 7-12, THE RECORD WILL REFLECT THE FOLLOWING:

"IN ORDER TO FIND THE DEFENDANT GUILTY OF POSS. OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME, YOU MUST FIRST FIND THE DEFENDANT GUILTY OF EITHER COMMITTING A VIOLENT CRIME OR ATTEMPTING TO COMMIT A VIOLENT CRIME. I CHARGE YOU THAT ARMED ROBBERY IS A VIOLENT CRIME."

APPELLANT SUBMITS THAT THIS RECHARGE ON THE LAW IS UNCONSTITUTIONAL AND IT CONSTRUCTIVELY AMENDS THE INDICTMENT. APPELLANT WAS NEVER INDICTED OF ATTEMPTING TO COMMIT ARMED ROBBERY WHICH IS 16-11-330 (A) SEE INDICTMENT.

THIS ERROR IS PREJUDICIAL AND AN ERROR OF LAW. APPELLANT IS ENTITLED TO RELIEF.

IN STATE V. WESTON, 367 S.C. 279, 292, 624 S.E. 2d 641 (2006), THE S.C. SUPREME HELD THAT WHEN THE STATE FAILS TO PRODUCE EVIDENCE OF THE OFFENSE CHARGED THE DEFENDANT IS ENTITLED TO A DIRECTED VERDICT.

FURTHER, IN STATE V. DICKEY, 394, S.C. 491, 716 S.E. 2d 97 (2011), THE STATE HELD THAT WHEN THE CIRCUIT COURT SUBMITS AN UNCONSTITUTIONAL OR AN INCOMPLETE CHARGE ON THE LAW THE JURY IS RENDERED INOPPERATIVE.

CONCLUSION

FOR THE FOREGOING REASONS APPELLANT IS ENTITLED TO RELIEF OF THIS ERRONEOUS CONVICTION AND RESPECTFULLY REQUESTS THE GRANTING OF RELIEF THIS COURT DEEMS APPROPRIATE.

PERRY B. BUCHANAN

S/ Perry B. Buchanan

APPELLANT PRO-SE